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Supreme Court, U.S.
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NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

L. G. McCORMICK AND
BEACON HILL FARMS, INC.,
Petitioners,

v.

TEXAS COMMERCE BANK,
NATIONAL ASSOCIATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FOURTEENTH COURT OF APPEALS DISTRICT OF TEXAS

LINDA LELIA SUSAN MORONEY
2606 First City Tower
Houston, Texas 77002
(713) 654-4588
Counsel of Record

JOHN D. GILPIN
GILPIN, PAXSON & BERSCH
1300 Post Oak Boulevard
Suite 2300
Houston, Texas 77056
(713) 623-8800
Counsel for Petitioners

Of Counsel:

DANIEL L. ROTENBERG
Professor of Law
University of Houston
Law Center
Houston, Texas 77204-6371
(713) 749-7357

Alpha Law Brief Co., Inc. — 8748 Westpark — Houston, Texas 77063 — 789-2000

QUESTION PRESENTED

In 1976, the Petitioner McCormick was convicted for the crime of conspiracy to commit theft. In a 1986 civil trial based on the same transaction, the 1976 criminal judgment of conviction and McCormick's appearance as a witness in an unrelated criminal trial in 1960 were admitted into evidence both as conclusive proof of his civil liability for fraud, conversion, and breach of contract, and also to impeach him. McCormick was prohibited from offering evidence to explain the 1976 conviction.

The question presented is:

1. Do the Texas courts, by giving offensive collateral estoppel effect to the 1976 conviction for conspiracy to commit theft in a subsequent civil lawsuit involving different elements of proof, violate the Petitioners' due process rights under the fourteenth amendment to the Constitution by (1) establishing fault without evidence and (2) denying Petitioners the opportunity to present evidence in their own defense?

> [Note: The Petitioners reserve the right to argue Questions 2 and 3 in the event certiorari is granted on the above question, but do not include Questions 2 and 3 among the reasons for the grant of certiorari.]

2. Does the use of the 1976 criminal judgment and McCormick's testimony in an unrelated criminal trial in 1960 for impeachment purposes violate the Petitioners' right to a fair trial under the due process clause of the fourteenth amendment to the Constitution?

3. Do the erroneous rulings of the trial court violate the Petitioners' right to a jury trial guaranteed by the seventh amendment to the Constitution?

LIST OF PARTIES

The parties to the proceedings below were the Petitioners, L. G. McCormick and Beacon Hill Farms, Inc., and the Respondent, Texas Commerce Bank, National Association. Petitioner Beacon Hill Farms, Inc. has no parent companies, subsidiaries, or affiliates to list pursuant to Rule 28.1.

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TEXAS COMMERCE BANK,
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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FOURTEENTH COURT OF APPEALS DISTRICT OF TEXAS

The Petitioners L. G. McCormick and Beacon Hill Farms, Inc. respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals for the Fourteenth Court of Appeals District of Texas, hereafter simply called the Fourteenth Court of Appeals, entered in the above-entitled proceeding on April 7, 1988.

OPINIONS BELOW

The opinion of the Fourteenth Court of Appeals is reported at 751 S.W.2d 887, and is reprinted in Appendix D, p. 4a, *infra*.

The denial of the Petitioners' Application for Writ of Error to the Supreme Court of Texas and the denial of their Motion for Rehearing are reported at 32 Tex. Sup. Ct. J. 62 (Nov. 26, 1988) and 32 Tex. Sup. Ct. J. 175 (Jan. 28, 1989), respectively. Notices from the Supreme Court of Texas are reprinted in Appendix A, p. 1a, and B, p. 2a, *infra*.

JURISDICTION

The judgment of the Fourteenth Court of Appeals, affirming the trial court's judgment in favor of Respondent, was entered on April 7, 1988. (Appendix C, p. 3a, *infra*). The Fourteenth Court of Appeals denied a timely motion for rehearing on June 23, 1988. The Supreme Court of Texas denied the Petitioners' Application for Writ of Error on November 23, 1988, and denied their Motion for Rehearing on January 25, 1989. (Appendix A, p. 1a, and B, p. 2a, *infra*).

On March 17, 1989, Justice White ordered that the time for filing this petition for writ of certiorari be extended to and including April 25, 1989. (Application No. A-738).[1]

The jurisdiction of this Court to review the judgment of the Fourteenth Court of Appeals is invoked under 28 U.S.C. § 1257(3).

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1. The Application for Extension of Time mistakenly indicated that the writ of certiorari would be directed to the Supreme Court of Texas.

U.S. CONSTITUTIONAL PROVISION AND TEXAS RULES OF EVIDENCE INVOLVED

THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION:

> nor shall any state deprive any person of life, liberty or property, without due process of law;

TEXAS RULE OF EVIDENCE 803. Hearsay Exceptions; Availability Of Declarant Immaterial

The following are not excluded by the hearsay rule . . .:

> (22) Judgment of previous conviction. Evidence of a judgment, entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere), adjudging a person guilty of a felony, to prove any fact essential to sustain the judgment of conviction. . . .

TEXAS RULE OF EVIDENCE 403:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice,[2] confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence.

STATEMENT OF THE CASE

A. Factual and Procedural Summary.

In early 1974, Petitioner McCormick entered into an agreement with M. L. Marshall to participate in a grain

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2. The Fourteenth Court of Appeals omits "unfair prejudice" in its reference to Rule 403. (Appendix D, pp. 9a-10a, *infra*).

trading business in West Texas. McCormick provided financing through Petitioner Beacon Hill Farms, Inc. and Marshall did business through Jim Ned Valley Supply, Inc. Petitioner Beacon Hill Farms, Inc. opened a checking account with Respondent Texas Commerce Bank to receive profits from the grain sales. In late 1974, a series of Jim Ned Valley Supply checks were deposited in Beacon Hill Farms' account but were returned for insufficient funds, resulting in a sizeable overdraft in that account. McCormick executed several personal guaranties and notes payable to Respondent in connection with the Beacon Hill Farms account.

In May 1975, Respondent made demand on McCormick for sums due, and instituted a criminal investigation of the banking transactions. Petitioner McCormick was indicted on a charge of criminal conspiracy, was prosecuted jointly with Marshall in a criminal trial, and a judgment of conviction of conspiracy to commit theft was entered on October 12, 1976. (S.F. 1080; Pl. Exh. 38; Appendix E, p. 15a, *infra*).[3] McCormick was sentenced to ten years' probation to begin December 1, 1976 and was fined $5,000.00; the fine was suspended. (Pl. Exh. 38, Appendix E, pp. 17a-18a, *infra*). One condition of probation was that he make restitution of $367,000.00, $20,000.00 of which was paid, but the payment terms for the remainder were left open and were never ordered by the criminal court. (Tr. 10; Pl. Exh. 38; S.F. 1206-1208, Appendix E, pp. 17a-18a, *infra*).

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3. Abbreviations of record references:
S.F. — Statement of Facts, the transcription of the court reporter's notes;
Pl. Exh. — Plaintiff's Exhibit;
Tr., 1st Supp. Tr., 2nd Supp. Tr. — Transcript, First Supplemental Transcript, Second Supplemental Transcript (trial court documents).

In 1976, Respondent filed a civil lawsuit against the Petitioners (and also Marshall and Jim Ned Valley Supply) alleging fraud by "check kiting", conversion, breach of contract, and quantum meruit. (Appendix G, pp. 22a *et seq., infra*). The Petitioners were not sued for civil conspiracy. There were only two isolated references in the petition to the word "conspiracy". (Appendix G, pp. 26a-27a, *infra*). Marshall and Jim Ned Valley Supply agreed to a judgment in favor of the Respondent, so Petitioners were the only remaining defendants. (Pl. Exh. 40; S.F. 119). Almost ten years after the suit was filed, the case came to trial before the Hon. Eugene Chambers, presiding judge of the 215th District Court of Harris County, Texas. By motion in limine, Petitioners unsuccessfully objected to any references to Petitioner McCormick's prior conviction for conspiracy on several grounds, including that the judgment was not final, that mention of it would be highly prejudicial, that it was remote in time, and the criminal conviction for conspiracy was a different action from the civil lawsuit filed by the Respondent. (1st Supp. Tr. p. 11; S.F. 38-43).

Throughout the trial, and over Petitioners' objections, from voir dire (S.F. 56-58) to opening statements by Respondent's counsel (S.F. 132-134), through the presentation of evidence (S.F. 227-233, 428-457, 566, 626-628, 920-921, 1166-1167, 1307-1324), and in closing argument, Respondent's counsel and witnesses made numerous references to Petitioner McCormick as an "unindicted co-conspirator" and "partner in crime" (based solely on the fact that he had been subpoenaed to appear as a witness in an unrelated 1960 criminal trial) and to the 1976 criminal conviction as proof that he actually acquired funds from the Bank

by fraud. Inevitably, these references adversely affected the jury's perception of McCormick's general character as well. But on direct examination and on redirect examination, when Petitioner McCormick attempted to explain the circumstances of his conviction for conspiracy to distinguish the criminal proceeding from the civil case, the trial court prohibited him from doing so. (S.F. 1080-1087, 1209-1211, 1307-1316; Appendix K, p. 79a, *infra*). The trial court even *sua sponte* sustained an objection that had not been made. (Appendix K, p. 82a, *infra*). McCormick, by bill of exceptions or offer of proof, argued his fundamental right to explain the circumstances, not as a collateral attack on the judgment but under established principles of Texas law. The bill contained his explanation, *inter alia*, that the 1976 criminal trial involved only the crime of conspiracy and not the completed crime of fraudulent taking of money, that his attorney in the criminal case refused to allow him to testify, did not cross-examine a key prosecution witness, and shortly after the trial accepted substantial financial contributions from Respondent and its lawyers in a political campaign. (Appendix H, pp. 57a *et seq.*, *infra*).

In final argument, the Respondent's attorney repeatedly urged the jury to consider McCormick's prior criminal conviction as compelling evidence of his civil liability (S.F. 1423-1425, 1448-1449, 1510-1512). Over objection, the last words the jury heard from the Respondent's attorney were:

> Mr. McFarland: . . . The $735,000 overdraft was the money they took out of a kite . . . And thousands of dollars went to Mr. McCormick. They are saying that's okay, that this was business expenses. There's

> no business exception to theft. When you are stealing money, it doesn't matter what you are spending it on . . .
>
> Mr. Gilpin talked to you about your duties as jurors. Your duty as a juror is no different from the duty of that other jury. Here are the figures. And he was convicted of the felony. Look at the details and compare it to Special Issue No. 2. "We the jury find the defendant Len Gardiner [sic] McCormick guilty.["]
>
> He was sentenced to ten years in prison and a fine of $5,000. He was supposed to pay three hundred sixty-seven [sic] restitution, of which he has paid $20,000 . . .
>
> Ladies and gentlemen of the jury, the answer is in the judgment of conviction . . .
>
> Thank you very much. (S.F. 1509-1512).

After three days of deliberation the jury returned its verdict in favor of Respondent, and the trial court entered judgment on the verdict in the amount of $1,958,424.57. (Appendix J, p. 77a, *infra*).

In this case of first impression in Texas, the Fourteenth Court of Appeals affirmed the judgment of the trial court, holding: (1) the judgment of conviction was admitted as substantive evidence only, and not for impeachment; (2) the prior conviction was properly admitted under TEXAS RULE OF EVIDENCE 803(22) "as substantive proof of facts in the civil case which were essential to the judgment in the criminal case"; (3) because "the pivotal issue in the adjudication of guilt that McCormick had engaged in a check kiting scheme which resulted in a debt obligation to the bank had been fully litigated and was essential to the criminal conviction,"

Petitioner McCormick was collaterally estopped from "attacking the judgment" by offering evidence in reply; (4) any rebuttal evidence offered by McCormick also was properly excluded under TEXAS RULE OF EVIDENCE 403 because its probative value would have been "substantially outweighed by the danger of confusion of the issues or misleading the jury"; (5) the Petitioners failed to object with the necessary specificity to preserve error with respect to the references to Petitioner McCormick as an "unindicted co-conspirator" and "partner in crime" in a 1960 grand jury investigation of Marshall;[4] and (6) the cumulative errors committed by the trial court did not "amount to such a denial of the rights of appellants as was reasonably calculated to cause and probably did cause rendition of an improper judgment or prevented appellants from making a proper presentation of the case to this court." (Appendix D, pp. 4a *et seq., infra*).

The Supreme Court of Texas denied the Petitioners' Application for Writ of Error and their Motion for Rehearing. (Appendix A, p. 1a, and B, p. 2a, *infra*).

B. How The Federal Question Was Presented.

This case represents a radical and sudden departure from the established law of Texas, the other states, the United States Court of Appeals for the Fifth Circuit, and this Court on the use of a judgment of conviction as collateral estoppel and as evidence in a subsequent civil trial. Petitioners initially relied on long-standing

4. McCormick actually was subpoenaed to testify not before a grand jury but in an unrelated criminal trial in which Marshall was acquitted. The original Appellants' Brief mistakenly referred to a grand jury proceeding instead of a trial. The record shows that it was a trial and that the defendants were acquitted. (S.F. 1316-1323).

precedent in presenting their appeal in the state system and could not have reasonably anticipated that the Court of Appeals would depart from that precedent. It would have been improper for Petitioners to raise the federal question until it became apparent that the Texas appellate courts were ignoring established principles. (*See* p. 15, *infra*).

In Texas, "fundamental error" in a civil case is "an error which directly or adversely affects the interest of the public generally, as that interest is declared in the statutes or constitution of this State." *Ramsey v. Dunlop,* 205 S.W.2d 979, 983 (Tex. 1957). A due process violation under the fourteenth amendment to the federal Constitution is fundamental error. *Williams v. Capitol County Mutual Fire Ins. Co.,* 594 S.W.2d 558, 560 (Tex. Civ. App.—Fort Worth 1980, no writ).

The federal due process question was properly presented under Texas appellate procedure, which allows fundamental error to be raised for the first time on appeal, and at any stage in the appellate process. *Id.;* 1 R. RAY, *Texas Law of Evidence Civil and Criminal* § 27 (Texas Practice 3d ed. 1980, 1986 Supp.). Fundamental error may be first asserted in a motion for rehearing. *Trevino v. Gonzalez,* 749 S.W.2d 221, 226 (Tex. App.—San Antonio 1988, no writ). Except in the appeal of summary or declaratory judgments, the appellate courts of Texas are even authorized to consider fundamental error which is not assigned by the parties. *Newman v. King,* 433 S.W.2d 420, 421 (Tex. 1968); *McCauley v. Consolidated Underwriters,* 304 S.W.2d 265, 266 (Tex. 1957). *Compare City of San Antonio v. Schautteet,* 706 S.W.2d 103, 104 (Tex. 1986) (constitutional challenges not expressly

presented to the trial court in a summary judgment proceeding may not be considered on appeal as grounds for reversal) *and Feinman v. State,* 717 S.W.2d 106, 115 (Tex. App.—Houston [1st Dist.] 1986, no writ) (same result in appeal of declaratory judgment).

The Fourteenth Court of Appeals expressly adopted "the standards of the federal judiciary," and thus the decision rests on the court's understanding of federal law. (Appendix D, p. 9a, *infra*). Therefore, the transgression of the due process clause has been accomplished by the Fourteenth Court of Appeals' misconstruction and misapplication of the federal Constitution and otherwise valid rules of evidence and the law of judgments, so that the state court's decision itself raises a federal question within this Court's review jurisdiction. *See Michigan v. Long,* 463 U.S. 1032, 1040-41 (1983); *Brinkerhoff-Faris Trust & Savings Co. v. Hill,* 281 U.S. 673, 680 (1930).

The due process violation demonstrated by the fundamental unfairness of the Petitioners' trial because of the trial court's rulings was first raised by clear implication by Petitioners' objections to rulings before and throughout trial, then expressly on appeal in the Petitioners' brief to the Fourteenth Court of Appeals (pp. 23-40), and expressly in the Petitioners' Application for Writ of Error to the Supreme Court of Texas (pp. 16-49).

In their Application for Writ of Error to the Supreme Court of Texas, the Petitioners expressly asserted a violation of art. I, § 19 of the Texas Constitution, which provides: "No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any

manner disenfranchised, except by the due course of the law of the land." TEX. CONST. art. I, § 19. (Appendix L, p. 83a, *infra*). The due course of law protection afforded by the Texas Constitution is equivalent to due process under the United States Constitution. *Price v. City of Junction*, 711 F.2d 582, 590 (5th Cir. 1983); *Cantu v. Parr*, 338 S.W.2d 182, 185 (Tex. Civ. App.—San Antonio), *appl'n dism'd w.o.j.*, 340 S.W.2d 481 (Tex. 1960) (per curiam); *Masonic Grand Chapter of Order of Eastern Star v. Sweatt*, 329 S.W.2d 334, 337 (Tex. Civ. App.—Fort Worth 1959, writ ref'd n.r.e.).

In their Motion for Rehearing in the Supreme Court of Texas, the Petitioners also expressly raised the violation of their right of due process and other rights guaranteed by the federal Constitution (p. 5; Appendix L, p. 83a, *infra*).

The record as a whole will show that the Petitioners brought the federal question to the attention of the state courts adequately and in due time; that the federal question was necessary to determine the case below and the necessary effect of the trial court's judgment, as affirmed on appeal, was to deny the Petitioners' federal claim. The record as a whole also will show there is no adequate and independent nonfederal ground on which this judgment could be based, because the due process violations so permeated the trial that any nonfederal ground is interwoven with the federal question and cannot be an adequate or independent matter. *Michigan v. Long*, 463 U.S. at 1041-43.

Although the opinion of the Fourteenth Court of Appeals is silent on the federal question raised by Petitioners,

the Texas appellate courts have necessarily decided the case adversely to the Petitioners' constitutional rights by rejecting their constitutional arguments and upholding the trial court's judgment, all under the deceptive guise of federal precedent. Therefore, the Petitioners' federal right was denied as much by the refusal of the Texas courts to directly decide the federal question as it would have been by an erroneous decision of it, for in either case, the violation is left undisturbed by those Texas courts whose jurisdiction to correct it was properly invoked. *See Lawrence v. State Tax Commission,* 286 U.S. 276, 282 (1932); *Super Tire Engineering Co. v. McCorkle,* 550 F.2d 903, 907 (3rd Cir. 1977), *cert. denied,* 434 U.S. 1025 (1978); *Eichelberger v. Eichelberger,* 582 S.W.2d 395, 400 (Tex. 1979).

REASONS FOR GRANTING THE WRIT

I.

The misapplication of the doctrine of collateral estoppel by the Texas courts violates the Petitioners' rights to due process under the fourteenth amendment to the United States Constitution by permitting a finding of fault without evidence and by denying Petitioners the opportunity to introduce evidence in their own defense.

The due process clause of the fourteenth amendment includes both the right to be adjudged at fault only upon evidence of fault, *see Thompson v. Louisville,* 362 U.S. 199, 206 (1960), and the right to introduce evidence in one's defense before liability is imposed. *Brinkerhoff-Faris Trust & Savings Co. v. Hill,* 281 U.S. at 681-82; *Hovey v. Elliott,* 167 U.S. 409, 414-18 (1897). It in-

cludes the right to introduce evidence at a meaningful time and in a meaningful manner, to cross-examine and produce witnesses, and to be heard on questions of law before a judgment is rendered. *Jordan v. Jordan,* 653 S.W.2d 356, 358 (Tex. App.—San Antonio 1983, no writ).

The doctrines of *res judicata* and collateral estoppel represent narrow exceptions to the due process guarantee. *United States v. Texas,* 430 F.Supp. 920, 925 n.6 (S.D. Tex. 1977). Under collateral estoppel, a judgment in a prior suit prevents the relitigation of issues which were actually litigated in that suit and which were necessary to the outcome of the first action. *Parklane Hosiery Co. v. Shore,* 439 U.S. 322, 326 n.5 (1979); 18 C. WRIGHT, A. MILLER & E. COOPER, *Federal Practice and Procedure* §§ 4402, 4416 (1981 & 1988 Supp.). As a matter of federal (and constitutional) law, in some circumstances this Court has held it is not necessary that the parties in the two suits be "mutual" or identical. *See Parklane Hosiery,* 439 U.S. at 326-27. While due process does not include the right to litigate the same issue twice, *Baldwin v. Iowa State Traveling Men's Association,* 283 U.S. 522, 524 (1931), it forbids a party to a later lawsuit from using collateral estoppel as a "sword" or as a "shield" unless that party's opponent has had an opportunity to actually litigate the issue in a prior action. *United States v. One 1975 Chevrolet K-5 Blazer,* 495 F.Supp. 737, 742 (W.D. Mich. 1980). Despite the trend toward broader use of the doctrine by abrogation of the mutuality requirement and increased use of "offensive" collateral estoppel, the underlying principle remains: due process requires the doctrine to be applied only against litigants who have had a full and fair opportunity to contest an issue. *Parklane*

Hosiery, 439 U.S. at 328; *Commodity Futures Trading Commission v. Chilcott Portfolio Management, Inc.*, 713 F.2d 1477, 1486 (10th Cir. 1983).

In addition to their use under collateral estoppel, prior criminal judgments also may be used as non-preclusive evidence in later proceedings. *See generally* MOTOMURA, *Using Judgments as Evidence*, 70 Minn. L. Rev. 979 (1986); 18 C. WRIGHT, A. MILLER & E. COOPER, *supra*, § 4416. If a criminal judgment meets other tests of admissibility and the criteria of FED. R. EVID. 803(22) or TEX. R. EVID. 803(22), it may be admitted "for what it is worth," and the findings inherent in it may be rebutted by the opponent, who should have the opportunity to offer an explanation about the conviction. FED. R. EVID. 803(22), advisory committee's notes; 1A R. RAY, *Texas Law of Evidence Civil and Criminal* § 1279 (Texas Practice 3d ed. 1980, 1986, Supp.).

Petitioner McCormick's judgment of conviction for conspiracy to commit theft was a general one, in that it did not specify the overt act or acts he was found to have committed. (Appendix E, pp. 15a-18a, *infra*). This Court in *Emich Motors Corp. v. General Motors Corp.*, 340 U.S. 558 (1951) considered the problem of ascertaining which facts had actually been determined in a prior trial based on a charge of conspiracy when the judgment of conviction did not establish that the defendant used all of the means charged in the indictment or any particular one. 340 U.S. at 569. The trial judge must examine the criminal record, including the pleadings, the evidence, and jury instructions, and then instruct the jury about which issues have been determined in the prior suit and limit the effect of the judgment as evidence in the present

action. *Id.* at 569-70; 18 C. WRIGHT, A. MILLER & E. COOPER, *supra*, § 4417. The Fifth Circuit has carefully applied this technique. *See, e.g., United States v. Monkey*, 725 F.2d 1007, 1010 (5th Cir. 1984); *United States v. Thomas*, 709 F.2d 968, 972 (5th Cir. 1983). If it is clear that a subsequent civil suit would require the adjudication of issues not addressed and necessary to the judgment in the prior criminal action, or if there is reasonable doubt as to what was decided in the first action, collateral estoppel does not apply. *Matter of Lewisville Properties, Inc.*, 849 F.2d 946, 949 (5th Cir. 1988); *see Matter of Braniff Airways*, 783 F.2d 1283, 1289 (5th Cir. 1986) (doctrine of *res judicata*); RESTATEMENT (SECOND) OF JUDGMENTS §§ 27, 28, 29, 85 (1982).

Until the decision of the Fourteenth Court of Appeals below, Texas law did not apply collateral estoppel to common fact issues decided in prior criminal convictions, even when the defendant had pled guilty. *State v. Benavidez*, 365 S.W.2d 638, 640 (Tex. 1963); *City of Houston v. Dillon*, 596 S.W.2d 212, 214 (Tex. Civ. App.—Houston [1st Dist.] 1980, writ ref'd n.r.e.); *Greenberg v. Mobil Oil Corp.*, 318 F.Supp 1025, 1034 (N.D. Tex. 1970). However, a prior felony judgment had been admissible as evidence under TEX. R. EVID. 803(22), *Juan A. v. Dallas County Child Welfare*, 726 S.W.2d 241, 245 (Tex. App.—Dallas 1987, no writ), and the question of the admissibility of a judgment had been differentiated from its preclusive effect. *Britt v. Cambridge Mutual Fire Ins. Co.*, 717 S.W.2d 476, 482 (Tex. App.—San Antonio 1986, writ ref'd n.r.e.). Even in its preclusive treatment of prior civil judgments, Texas had required mutuality of parties or their privies. *Bonniwell v. Beech Aircraft Co.*, 663 S.W.2d 816, 818 (Tex. 1984); *Benson v. Wanda Petroleum Co.*, 468 S.W.2d 361, 363 (Tex. 1971). *See*

generally GOODE, WELLBORN & SHARLOT, *Texas Rules of Evidence: Civil and Criminal* § 803.27 (Texas Practice 1988).

It is undisputed in this case that the trial court did not examine the record from the prior criminal trial. The Fourteenth Court of Appeals ignored the trial court's failure to do so, and compounded the error by accepting the non-evidentiary contention of the Respondent's attorney that "[i]t is a conviction involving the same facts. And the necessary facts to the conviction are the same facts that we have on trial in this case." (Appendix D, p. 6a, *infra*). In the court's words, "the pivotal issue in the adjudication of guilt—that McCormick had engaged in a check kiting scheme which resulted in a debt obligation to the bank—had been fully litigated and was essential to the criminal conviction." From this erroneous assumption, the Fourteenth Court of Appeals concluded that "[a] fully litigated issue should not be retried." (Appendix D, p. 9a, *infra*). The court further concluded that McCormick was, therefore, collaterally estopped from "attacking the judgment" by offering evidence in reply, and that his rebuttal evidence also was properly excluded under TEX. R. EVID. 403 because it would have confused the issues and misled the jury. (*Id.*) These conclusions are wrong for numerous reasons, among them the following:

1. The criminal charge against McCormick was conspiracy, an inchoate crime, *McCann v. State*, 606 S.W.2d 897, 898 (Tex. Crim. App. 1980), and the civil causes of action, the verdict, and the civil judgment were based on the completed act of obtaining money by fraud, conversion, or breach of contract. (Tr. 4 *et seq.*, 55-58; Appendix G, pp. 21a-33a; I, pp. 62a-75a; J, pp. 76a-78a, *infra*). Jury issues 2-5 concerned the "check kiting" claim.

(Appendix I, pp. 67a-69a, *infra*). The jury found that the act of "check kiting", not a conspiracy to do so, proximately caused damages to Respondent, so the issue on conspiracy was superfluous. *New Process Steel Corp. v. Steel Corp. of Texas,* 703 S.W.2d 209, 213 (Tex. App. —Houston [1st Dist.] 1985, writ ref'd n.r.e.). "Check kiting", the keystone of Respondent's lawsuit, is a species of fraud in Texas. *Denby v. State,* 654 S.W.2d 457, 459 (Tex. Crim. App. 1983). The elements of civil fraud in Texas are: (1) a material representation was made, (2) it was false, (3) the speaker knew it was false or made it recklessly, (4) it was made with the intention that it be acted upon by the party, (5) the party acted in reliance on it, (6) thereby suffering damages. *Trenholm v. Ratcliff,* 646 S.W.2d 927, 930 (Tex. 1983). In the prior criminal case, it was not necessary for the State to prove that McCormick actually committed fraud to sustain a conviction for conspiracy, but only that he had an agreement to engage in conduct that would constitute theft and that he engaged in some overt act in furtherance of the agreement. TEX. PENAL CODE ANN. § 15.02 (Vernon 1974). The elements of proof in the two actions are wholly dissimilar.

2. The indictment for conspiracy alleges that McCormick engaged in three overt acts which involved "making", "drawing" or "uttering" negotiable instruments (Appendix F, pp. 19a-20a, *infra*). Under the Uniform Commercial Code, the first two verbs refer to the creation of negotiable instruments. TEX. BUS. & COM. CODE ANN. § 3.104 (Vernon 1968). The third refers to the act of transferring forged instruments. *McGee v. State,* 681 S.W. 2d 31 (Tex. Crim. App. 1984) (En Banc); *Id.* at 32 (Teague, J., concurring). The receipt of property and

proof of its value are critical elements in the crime of theft but they are not required to prove issuance of a bad check. *Christiansen v. State,* 575 S.W.2d 42, 44 (Tex. Crim. App. 1979). Thus, none of these alleged overt acts denotes the receipt of money, so that even if McCormick had been found to have committed all three of the overt acts contained in the indictment, such a finding would not have proved that he received anything of value. The receipt of the Respondent's funds by fraudulent or other means was the essence of the civil lawsuit, so the criminal conviction was not probative of any dispositive issue in the civil case.

3. The judgment of conviction is not final, *inter alia,* because it does not contain all of the terms of probation. *See Arguijo v. State,* 738 S.W.2d 367, 369 (Tex. App.—Corpus Christi 1987, no pet.). The restitution payment terms in the judgment were left open and the undisputed evidence at trial shows that McCormick has never been ordered how to pay the $367,000.00 restitution. (S.F. 1206-1208; Appendix K, pp. 79a-82a, *infra*). Only a valid and final judgment can give rise to collateral estoppel. *Van Dyke v. Boswell, O'Toole, Davis & Pickering,* 697 S.W.2d 381, 385 (Tex. 1985); RESTATEMENT (SECOND) OF JUDGMENTS § 29 Comment a. (1982).

4. The Fourteenth Court of Appeals confuses the use of judgments for collateral estoppel purposes and judgments as evidence under TEX. R. EVID. 803(22), treating them as synonymous. By so doing, the court has, in effect, transformed evidence of the prior criminal judgment into an "irrebuttable presumption". In its thorough misunderstanding of the distinction between judgments as preclusion tools and as evidence, the Texas court seems to be alone among the states. *Contra, e.g., Mueller v.*

J. C. Penney Co., 173 Cal. App. 3d 713, 219 Cal. Rptr. 272, 279 n.10 (1985); *Crowell v. Heritage Mutual Ins. Co.*, 346 N.W.2d 327, 330 n.4 (Wis. App. 1984); *Aetna Casualty & Surety Co. v. Collins*, 143 Mich. App. 661, 373 N.W.2d 177, 179 (Mich. App. 1985).

5. The estoppel effect of a general conspiracy count is limited to those facts necessary to establish the essence of a conspiracy (*i.e.*, an agreement and some overt act) when it cannot be determined which means were used to carry out the conspiracy. *United States v. Podell*, 572 F.2d 31, 36 (2nd Cir. 1978). It is not possible to determine from this general judgment of conviction for conspiracy which facts were proven in Petitioner McCormick's criminal trial. In analyzing the collateral estoppel effect of that judgment, the trial court was required to examine the entire record to ascertain exactly what was decided. *DeCavalcante v. Commissioner of Internal Revenue*, 620 F.2d 23 (3rd Cir. 1980); *Brown v. United States*, 524 F.2d 693, 699 (Cl. Ct. 1975). *United States v. Guzzone*, 273 F.2d 121, 123 (2d Cir. 1959) (citing *Emich Motors Corp. v. General Motors Corp.*). When these principles are applied to McCormick's judgment of conviction, it becomes clear that the judgment has no preclusive effect at all in the civil case.

6. At most, the 1976 judgment should have been admitted as nonpreclusive evidence under TEX. R. EVID. 803(22), and at least McCormick should have been permitted to explain it. If the judgment met the requirements of TEX. R. EVID. 403 for admissibility, it is nonsensical to prevent McCormick from rebutting it on that ground.

The Fourteenth Court of Appeals has both permitted the Petitioners' fault to be adjudged without evidence of

fault and has prohibited the Petitioners from offering evidence in their defense. These errors constitute a blatant violation of the Petitioners' right of due process under the fourteenth amendment. *See Thompson v. Louisville*, 362 U.S. at 206; *Brinkerhoff-Faris Trust*, 281 U.S. at 681-82.

The Texas court has created a precedent which is wrong, which is in conflict with decisions of this Court, the Fifth Circuit, and the other states, and which is likely to lead to further confusion. This Court should not allow such a decision to stand.

II.

Given the extensive use of criminal convictions in subsequent civil trials, and granted the legitimate policy goals of collateral estoppel, it is important that the doctrine be used properly and that misuse of the doctrine which leads to unconstitutional applications be corrected by this Court.

Prior criminal convictions affect later civil litigation in a variety of contexts. *See, e.g., United States v. Monkey*, 725 F.2d 1007 (drug offenses); *Matter of Lewisville Properties*, 849 F.2d 946 (bankruptcy); *United States v. Licavoli*, 725 F.2d 1040 (6th Cir. 1984) (civil RICO); and WALLACE, *Drexel's Deal: Crime and Punishment, Costs and Benefits*, N.Y. Times, Jan. 1, 1989 at E6 (securities fraud).

As the courts labor under a staggering caseload, it is understandable that they would seek any legitimate means for disposing of litigation more quickly. One such vehicle suggested by this Court is the increased use of summary

judgments. *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986). Collateral estoppel, at least at first glance, appears to be another. The laudable policies supporting the doctrine include efficiency, repose and consistency. MOTOMURA, *supra*, at 1003-04; 18 C. WRIGHT, A. MILLER & E. COOPER, *supra*, § 4416.

However, misunderstanding of the distinction between judgments used as collateral estoppel and judgments used as evidence, such as occurred below, leads to the violation of fundamental rights of procedural due process. As one commentator has noted, "[c]ourts exist for the purpose of trying lawsuits. If the courts are too busy to decide cases fairly and on the merits, something is wrong." CLEARY, *Res Judicata Reexamined*, 57 Yale L.J. 339, 348-49 (1948). Likewise, something is wrong if misguided courts abridge constitutional guarantees by misapplying collateral estoppel. The Supreme Court of Texas has failed to reverse the Fourteenth Court of Appeals, so that this case represents the law of the State of Texas, with the ostensible approval of the federal judiciary. (Appendix D, pp. 8a-9a, *infra*). Beyond correcting the miscarriage of justice suffered by the Petitioners, this Court should intervene to prevent an erroneous and confusing Texas precedent from misleading courts in Texas and in other states into committing further due process violations by misapplication of collateral estoppel.

CONCLUSION

For these reasons, this petition for certiorari should be granted, and the judgment of the Fourteenth Court of Appeals should be reversed.

Respectfully submitted,

LINDA LELIA SUSAN MORONEY
2606 First City Tower
Houston, Texas 77002
(713) 654-4588
Counsel of Record

JOHN D. GILPIN
GILPIN, PAXSON & BERSCH
1300 Post Oak Boulevard
Suite 2300
Houston, Texas 77056
(713) 623-8800
Counsel for Petitioners

Of Counsel:

DANIEL L. ROTENBERG
Professor of Law
University of Houston Law Center
Houston, Texas 77204-6371
(713) 749-7357

April 21, 1989

APPENDIX

APPENDIX A

SUPREME COURT OF TEXAS
P. O. Box 12248
Supreme Court Building
Austin, Texas 78711
Mary M. Wakefield, Clerk

January 25, 1989

Mr. John D. Gilpin
Gilpin, Paxon & Bersch
1300 Post Oak Boulevard
2300 First Interstate Tower
Houston, TX 77056

Ms. Linda L. S. Moroney
Gilpin, Paxson & Bersch
1300 Post Oak Blvd.
2300 First Interstate Tower
Houston TX 77056

Mr. D. Mitchell McFarland
Liddell, Sapp, Zivley, Hill & LaBoon
3300 Texas Commerce Tower
Houston TX 77002

Ms. Anna M. Jobsis
Liddell, Sapp, Zivley, Hill & LaBoon
3300 Texas Commerce Tower
Houston TX 77002

RE: Case No. C-7707

STYLE: L. G. MCCORMICK ET AL.
v. TEXAS COMMERCE BANK,
NATIONAL ASSOCIATION

Dear Counsel:

The motion for rehearing in the above referenced application for writ of error was this day overruled.

Justice Cook and Hightower not sitting.

Respectfully yours,
Mary M. Wakefield, Clerk
By: /s/ BLANCA E. MORIN
Deputy

APPENDIX B

SUPREME COURT OF TEXAS
P. O. Box 12248
Supreme Court Building
Austin, Texas 78711

Mary M. Wakefield, Clerk

November 23, 1988

Mr. John D. Gilpin
Ms. Linda L. S. Moroney
Gilpin, Paxon & Bursch
1300 Post Oak Blvd.
23rd Floor
Houston TX 77056

Mr. D. Mitchell McFarland
Ms. Anna M. Jobsis
Liddell, Sapp, Zivley, Hill & LaBoon
3300 Texas Commerce Tower
Houston TX 77002

RE: Case No. C-7707

STYLE: L. G. MCCORMICK ET AL.
v. TEXAS COMMERCE BANK,
NATIONAL ASSOCIATION

Deal Counsel:

The application for writ of error, as supplemented, in the above-styled case was this day denied with the notation, Writ Denied.

Justice Kilgarlin and Cook not sitting.

Respectfully yours,

Mary M. Wakefield, Clerk

By: /s/ PEGGY LITTLEFIELD
Peggy Littlefield, Chief Deputy

APPENDIX C

THE STATE OF TEXAS

JUDGMENT

April 7, 1988

THE FOURTEENTH COURT OF APPEALS

NO. B14-86-00743-CV

L. G. McCORMICK, et al., APPELLANTS

v.

TEXAS COMMERCE BANK NATIONAL ASSOCIATION, APPELLEE

This cause, an appeal from the judgment in favor of Texas Commerce Bank National Association, signed on June 30, 1986, came on to be heard on the transcript of the record. We have inspected the record and find no error in the judgment. It is ordered that the judgment of the court below be affirmed.

We order L. G. McCormick and Beacon Hill Farms, Inc., and their surety, The Aetna Casualty and Surety Company, to pay all costs incurred by reason of this appeal. This decision is ordered certified below for observance.

APPENDIX D

L.G. McCORMICK, et al.,
Appellants,

v.

TEXAS COMMERCE BANK
NATIONAL ASSOCIATION,
Appellee.

No. B14-86-00743-CV.

Court of Appeals of Texas,
Houston (14th Dist.).

April 7, 1988.

Rehearing Denied June 23, 1988.

A bank which was the victim of a check kiting scheme sued an individual and corporate defendant for damages. The 215th District Court for Harris County, Eugene Chambers, J., found for plaintiff and defendant appealed. The Court of Appeals, Murphy, J., held that: (1) prior felony conviction of individual defendant arising out of the same check kiting scheme was admissible; (2) trial court did not err in refusing to permit defendant to explain circumstances of his prior criminal conviction; (3) defense counsel's objection to certain evidence was not preserved on appeal because the reason for the objection was not articulated; (4) jury was properly impaneled; and (5) no jury misconduct justifying mistrial occurred.

Affirmed.

John D. Gilpin, Houston, for appellants.

D. Mitchell McFarland, Laura Gibson, Anna M. Jobsis, Houston, for appellee.

Before PAUL PRESSLER, MURPHY and ELLIS, JJ.

OPINION

MURPHY, Justice.

L.G. McCormick and Beacon Hill Farms, Inc., appeal from a jury verdict in favor of Texas Commerce Bank ("TCB"). TCB sued appellants and W.L. Marshall (not a party to this appeal), alleging that they conspired to commit fraud by a "check kiting scheme." By passing worthless checks and drafts among three banks located in three different cities, appellants took advantage of the time lapse in the check collection process and thereby obtained false credit. These paper transfers, totalling several million dollars, created an overdraft on the Beacon Hill Farms, Inc.'s corporate account in the amount of $735,574. When the overdraft was discovered in December 1974, McCormick, as the sole owner of the corporation, personally guaranteed payment of the overdraft and any other indebtedness of Beacon Hill Farms, Inc., but he ultimately failed to make such payment. McCormick and Marshall were indicted by a grand jury for conspiracy to commit theft. A jury trial in 1976 resulted in conviction; McCormick was sentenced to ten years in prison and ordered to pay a fine of $5,000. His sentence was subsequently suspended; he was placed on probation for ten years and ordered to make restitution of $367,000 to TCB. The restitution remains unpaid.

Immediately after the 1976 conviction, TCB filed suit, seeking an enforceable civil judgment against McCormick,

Beacon Hill Farms, Inc., and Marshall. Marshall admitted liability and signed an agreed judgment in favor of TCB. In March 1986, the civil case against McCormick and Beacon Hill Farms, Inc., went to trial.

In seven points of error, appellants allege that the trial court erred in admitting certain evidence, in failing to allow McCormick to explain the circumstances surrounding his criminal conviction, in impaneling a jury, in failing to dismiss a biased juror, and in permitting cumulative error causing an improper rendition of judgment. We affirm.

Appellants' second, third, and fourth points of error relate to admission of evidence of McCormick's prior conviction for conspiracy to commit theft.

The record shows that when TCB attempted to introduce the criminal court record at trial, appellants objected to its admission arguing that the judgment in the criminal trial was irrelevant, remote in time, and did not constitute a final conviction because the sentence was probated. Counsel for TCB urged admission of the conviction under Rule 803(22) of the Texas Rules of Evidence, specifically stating, "It is a conviction involving the same facts. And the necessary facts to the conviction are the same facts that we have on trial in this case." The judgment of conviction and sentence were introduced and admitted as substantive evidence. Those points of error relating to admission of the conviction for impeachment purposes, point three and a portion of point four, are overruled.

[1] In their second point of error appellants contend that it is reversible error to admit evidence of a prior conviction in a subsequent civil trial arising out of the

same facts when the criminal defendant had entered a not guilty plea. We disagree. The Texas Rules of Evidence provide the following exception to the hearsay rule:

> (22) Judgment of previous conviction. Evidence of a judgment, entered after a trial or upon a plea of guilty . . . , adjudging a person guilty of a felony, to prove any fact essential to sustain the judgment of conviction.

Tex. R. Evid. 803(22).

The case before us presents the very circumstance contemplated by the rule. McCormick had been tried and convicted of a felony; his plea of not guilty is irrelevant. Neither can he escape the effect of the rule because his sentence was probated. Evidence of his felony conviction was offered as substantive proof of facts in the civil case which were essential to the judgment in the criminal case. The rule supplanted the Texas common law and need not be reconciled with prior case law. The cases cited by appellants pre-date rule 803(22), do not involve defendants who were adjudicated guilty or who pleaded guilty and are, therefore, inapplicable. Evidence of the conviction was properly admitted. *See Britt v. Cambridge Mutual Fire Insurance Co.*, 717 S.W.2d 476 (Tex. App.—San Antonio 1986, writ ref'd n.r.e.). Appellants' second point of error is overruled.

In related point four, appellant argues that even if evidence of the conviction can be properly admitted as substantive proof under rule 803(22), the findings of the criminal judgment are not conclusive under the doctrine of collateral estoppel but are rebuttable, and, therefore, McCormick should have been allowed to explain mitigating circumstances respecting the prior conviction,

specifically, his claim of inadequate representation by counsel. We disagree.

[2] The question whether findings of a criminal judgment are conclusive under the doctrine of collateral estoppel has not been addressed by the Texas courts with respect to the new evidentiary rule 803(22). Prior to the adoption of 803(22), our supreme court held that a collateral attack, an attack on the validity of a judgment in a suit not instituted for that purpose, is an impermissible attempt to avoid the binding effect of a judgment. *See Akers v. Simpson,* 445 S.W.2d 957, 959 (Tex. 1969). The federal courts have also concluded that a prior conviction may work an offensive collateral estoppel in a subsequent civil proceeding if the identical issues for which estoppel is sought were litigated and directly determined in the prior criminal proceeding. *Vela v. Alvarez,* 507 F.Supp. 887, 889 (S.D. Tex. 1981), citing *Emich Motors Corp. v. General Motors Corp.,* 340 U.S. 558, 569, 71 S. Ct. 408, 414, 95 L.Ed. 534 (1951). The doctrine is equitable; because of the existence of a higher standard of proof and greater procedural protection in a criminal prosecution, a conviction is conclusive as to an issue arising against the criminal defendant in a subsequent civil action. *United States v. Thomas,* 709 F.2d 968, 972 (5th Cir. 1983), citing *In the Matter of Raiford,* 695 F.2d 521 (11th Cir. 1983).

Federal cases making specific reference to Federal Rule of Evidence 803(22) use the identical prerequisites in giving offensive collateral estoppel effect to criminal judgments. Where (i) the issue at stake was identical to that in the criminal case, (ii) the issue had been actually litigated, and (iii) determination of the issue was a critical and necessary part of the prior judgment, the judgment

is established by offensive collateral estoppel and is within the hearsay exception of federal rule of evidence 803(22). *United States v. Monkey*, 725 F.2d 1007, 1010 (5th Cir. 1984). When the requirements are satisfied, a party is estopped from attacking the judgment or any issue necessarily decided by the guilty verdict. *Monkey*, 725 F.2d at 1010.

Applying the standards of the federal judiciary to Texas Rules of Evidence 803(22), we hold that the trial court did not err in refusing to permit McCormick to explain the circumstances of his criminal conviction. To allow McCormick to present evidence of inadequate representation by counsel would impugn the validity of the judgment; such an explanation would place in the jurors' minds a question as to whether guilt would have been assessed if counsel had conducted a different defense. The pivotal issue in the adjudication of guilt—that McCormick had engaged in a check kiting scheme which resulted in a debt obligation to the bank—had been fully litigated and was essential to the criminal conviction. The trial court correctly excluded appellants' offer of proof contained in a bill of exception. The appropriate forum for attacking the criminal judgment was by appeal. A fully litigated issue should not be retried.

The exclusion is further justified under rule 403, providing that relevant evidence may be excluded if its probative value is substantially outweighed by the danger of confusion of the issues or misleading the jury. Tex. R. Evid. 403. Proof establishing McCormick's liability to the bank included a signed letter agreement. The authenticity of this personal guarantee was not questioned. In this circumstance, evidence that his criminal defense counsel was less than zealous would have little probative

value and could tend to distract the jurors from the central issue of conspiracy to commit theft. Appellants' fourth point of error is overruled.

By their first point of error, appellants contend that the trial court erred in admitting references to McCormick's appearance before a grand jury in 1960 when he was merely summoned to testify in an investigation of Marshall and was not indicted or convicted. The reference occurred upon cross-examination of McCormick by counsel for TCB:

> Q: Mr. Marshall had a problem with the law with regard to the Tuscola Bank, didn't he?
>
> A: I think he did. I was called as a witness, sworn as a witness. I was like the rest, outside.
>
> Q: Were you warned that you were also named as an unindicted co-conspirator?

Whereupon counsel for McCormick objected in the following manner:

> Your Honor, in this case, he brings up something like that. And the Court won't let me go into an explanation of the conviction. And that goes into one of the reasons for the conviction.
>
> . . . .
>
> The Court: Overrule the objection.

The question was not renewed and never answered. During closing argument, TCB again referred to McCormick as an unindicted co-conspirator in the 1960 investigation of Marshall. No objection was raised.

On appeal, appellants argue that these references to McCormick as an unindicted co-conspirator were uninvited, irrelevant, and impermissible. Appellants cite

Texas Rule of Evidence 608(b), which prohibits the introduction of evidence of specific instances of the conduct of a witness in order to attack his credibility.

[3] In order to preserve a complaint for appellate review, a party must have presented to the trial court a timely objection, stating the *specific grounds* for the ruling desired, unless the grounds are apparent from the context of the objection. *Martinez v. State,* 732 S.W.2d 401, 403 (Tex. App.—Houston [14th Dist.] 1987, no pet); Tex. R. App. P. 52(a). While we agree with appellants that the reference was uninvited and irrelevant, we do not find a proper objection in the statement quoted above. Error was not preserved. The first point of error is overruled.

[4] In their fifth point of error, appellants contend that the trial court erred in impaneling a jury because no demand for one had been made as required by Texas Rule of Civil Procedure 216. TCB apparently paid a jury fee in 1981 and on trial day in 1986 insisted that demand for a jury trial had also been made when the fee was paid. Neither proof of payment nor proof of demand is a part of the record. Apparently, appellants contest only whether demand was made. Rule 216 provides that "[n]o jury shall be had in any civil suit, unless application be made therefore and unless a fee . . . be deposited by applicant with the clerk . . . a reasonable time before the date set for trial of the cause on the *non-jury* docket, but not less than ten days in advance." (Emphasis added.) Appellants contend that the right to a jury trial in a civil case depends upon strict compliance with rule 216. They cite *Huddle v. Huddle,* 696 S.W.2d 895 (Tex. 1985) for the proposition that TCB was not entitled to a jury trial because no timely demand for one had been made.

Appellants' reliance is misplaced. In *Huddle* our supreme court held that time limitations apply with equal force to the application for jury trial and the payment of the jury fee; both must be effected more than ten days before the date of trial set on the *non-jury* docket. In *Huddle* the case had been set on the non-jury docket and, although the fee was paid thirteen days in advance of trial, jury demand was not made until the eve of trial. The eleventh hour demand clearly constituted surprise to the opposing party. However, the factual situation before us is not parallel. TCB contends that the ten year old case had never been set on the non-jury docket and had, in fact, been set on the *jury* docket numerous times, a fact that appellants do not refute. Four months before trial, appellants had agreed to a preferential trial setting. There could be no surprise to appellants. The question is governed by an abuse of discretion standard. *See Huddle*, 696 S.W.2d at 895. Absent proof that the case was set on the non-jury docket and surprise to the appellants, we find no abuse of discretion. Appellants' fifth point of error is overruled.

In their sixth point of error, appellants complain that the trial court erred in failing to excuse juror North when during trial she revealed to the court a bias she had withheld during voir dire. During voir dire TCB asked the jury panel generally if any of them had ever worked for a bank or a lending institution. Appellants asked if any one of the jurors felt that the testimony of one who is a bank officer should be given greater or lesser credibility than that of any other witness. Appellants also asked if there were any "mystique" about a bank. Mrs. North did not respond to any of these questions. Early in the trial proceedings Mrs. North advised the court that her

twenty-eight year old son worked for a Dallas bank, not affiliated with TCB. Upon questioning by the court and counsel, she stated that she did not feel that there was anything about the fact that he worked for a bank that would prevent her from being fair and impartial. Appellants moved that she be excused; later in the trial appellants twice moved for mistrial based upon her presence on the jury; all motions were overruled. Appellants now contend that under Texas Rule of Civil Procedure 327(a) they are entitled to a new trial because of Mrs. North's "misconduct." Rule 327(a) provides:

> a. When the ground of a motion for new trial, supported by affidavit, is misconduct of the jury or of the officer in charge of them, or because of any communication made to the jury, or that a juror gave an erroneous or incorrect answer on voir dire examination, the court shall hear evidence thereof from the jury or others in open court, and may grant a new trial if such misconduct proved, or the communication made, or the erroneous or incorrect answer on voir dire examination, be material, and if it reasonably appears from the evidence both on the hearing of the motion and the trial of the case and from the record as a whole that injury probably resulted to the complaining party.

Tex. R. Civ. P. 327(a).

[5] In the absence of a clear showing of abuse of judicial discretion, an appellate court is bound by the trial court's determination as to the occurrence of jury misconduct. *Baker Marine Corp. v. Weatherby Engineering Co.*, 710 S.W.2d 690, 692 (Tex. App.—Corpus Christi 1986, no writ); *Shop Rite Foods, Inc. v. Upjohn Co.*, 619 S.W.2d 574, 582 (Tex. App.—Amarillo 1981,

writ ref'd n.r.e.). We find no overt act of misconduct (as required by rule 327(a)) on the part of Mrs. North. Her silence was not a misrepresentation. No jury panelist was asked if a member of his family were a banker. A juror cannot be held to have concealed that which she was never asked to disclose. The trial court did not abuse its discretion. Point of error six is overruled.

In their final point of error, appellants contend that cumulative errors, non-reversible individually, pervaded the trial and, thus, in the aggregate caused the rendition of an improper verdict. We disagree. Reversal based upon cumulative error is predicated upon meeting the standards of Texas Rule of Appellate Procedure 81(b). Having reviewed the incidences alleged to be error, we do not find that the errors complained of amount to such a denial of the rights of appellants as was reasonably calculated to cause and probably did cause rendition of an improper judgment or prevented appellants from making a proper presentation of the case to this court. Point of error seven is overruled.

The judgment of the trial court is affirmed.

APPENDIX E

MINUTES OF THE 176TH DISTRICT COURT
OF HARRIS COUNTY AT AUGUST TERM, 1976

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JUDGMENT

NO. 244664

THE STATE OF TEXAS

v.

Len Gardner McCormick

Date October 4, 1976

The Defendant having been indicted in the above entitled and numbered cause for the felony offense of Conspiracy to commit theft and this cause being this day called for trial, the State appeared by her District Attorney and the Defendant, Len Gardner McCormick appeared in person and by Counsel, Frank Briscoe, and both parties announced ready for trial. The defendant was arraigned, and in open court pleaded not guilty to the charge contained in the indictment. Thereupon a jury composed of John C. Wallin and eleven others was selected, impanelled, and sworn; and after hearing the indictment read, the Defendant's plea of not guilty thereto, and the evidence submitted; and after having been charged by the Court as to their duty to determine the guilt or innocence of the Defendant; and after hearing the argument of counsel, they retired in charge of the

proper officer and returned into open court on the 12th day of October, 1976, the following verdict, which was received by the Court and is here entered of record upon the minutes:

"We the jury find the defendant Len Gardner McCormick guilty as alleged in the indictment.

/s/ John C. Wallin
FOREMAN

Thereupon, the Defendant having requested in writing at the time he entered his plea of not guilty, in open court, that the jury assess the punishment, the jury, in accordance with law, heard further evidence, and having been again charged by the Court, the jury retired in charge of the proper officer and returned into open Court on the 12th day of October, A.D. 1976, the following verdict, which was received by the Court and is here entered of record upon the minutes: "The Defendant having been found guilty of Criminal Conspiracy as alleged in the indictment, We, the Jury, assess his punishment at confinement in the Department of Correction of the State of Texas for ten years and a fine of Five Thousand Dollars ($5,000.00) and further find that the Defendant has never before been convicted of a felony in this State or any other State and recommend that this sentence be probated.

/s/ John C. Wallin, Foreman
FOREMAN"

It is therefore considered, ordered, and adjudged by the Court that the Defendant is guilty of the offense of

Conspiracy to commit theft, a felony, as found by the jury, and that the said defendant committed the said offense on the 27th day of November, A.D. 1974 and that he be punished, as found by the jury, by confinement in the Texas Department of Corrections for 10 years and a fine of $5,000.00, and that the State of Texas do have and recover of the Defendant all costs of the prosecution, for which execution will issue, and that the Defendant be remanded to jail to await the further orders of this Court.

Imposition of this sentence suspended and Defendant placed on adult probation for 10 years, $5000.00 fine, pending his abiding by and not violating the following terms of probation: Terms:

(a) Commit no offense against the laws of this or any other state or of the United States;

(b) Avoid injurious or vicious habits (including the use of narcotics or habit-forming drugs and alcoholic beverages);

(c) Avoid persons or places of disreputable or harmful character;

* * *

(e) Permit the Probation Officer to visit you at your home or elsewhere;

(f) Work faithfully at suitable employment and notify the Probation Officer prior to changing employment;

(g) Remain within the limits of United States of America or Mexico, and change place of residence only with permission of the Probation Officer;

(h) Support your dependents;

(i) Pay your fine, if one be assessed, and all court costs whether a fine be assessed or not, in one or several sums, and make restitution or reparation in any sum that the Court shall determine, to-wit: Pay $367,000.000 [sic] Restitution, $20,000.00 of which is due 11-16-77 at which time a hearing will be held to determine the amount of future payments to the Texas Commerce Bank. All Restitution payments to be paid through the Adult Probation Department of Harris County, Texas;

(j) Pay a Duration Supervision Fee to Harris County, Texas, at the rate of $10.00 per month, beginning December 1, 1976. All payments to be paid through the Adult Probation Department of Harris County, Texas.

Clerk of the Court furnished the Probationer with a copy of the Terms and Conditions of Probation.

APPENDIX F

PLAINTIFF'S EXHIBIT 36

IN THE 176TH DISTRICT COURT
OF HARRIS COUNTY

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CAUSE NO. 244664

THE STATE OF TEXAS

v.

LEN GARDNER McCORMICK
2016 Main
Houston, Texas

(Filed April 8, 1976)

CHARGE: CONSPIRACY TO COMMIT THEFT

JUSTICE COURT NO.: DIRECT NCF

BAIL: $5,000.00

IN THE NAME AND BY AUTHORITY OF THE STATE OF TEXAS:

The Grand Jury of Harris County, State of Texas, duly organized at the February Term, 1976, of the 208th District Court of said County, in said Court, at said term, do present that in the County of Harris and State of Texas one LEN GARDNER McCORMICK hereinafter referred to as the Defendant, heretofore on or about November 27, 1974, did then and there unlawfully on

or about the 27th day of November, 1974, in said County and State did then and there knowingly and with intent that the offense of theft be committed, agree with W. L. Marshall to deprive Texas Commerce Bank National Association, a National Banking Association, with principal offices in Houston, Harris County, Texas, of property, namely money, owned by the Texas Commerce Bank National Association and of the value of over ten thousand dollars ($10,000.00) and in pursuance of such agreement, the said Len Gardner McCormick and W. L. Marshall did make, utter and draw negotiable instruments, namely checks and drafts on an account in the said Texas Commerce Bank National Association, designated Beacon Hill Farms, Inc., and checks on an account in the Citizens National Bank, Abilene, Texas, designated Jim Ned Valley Grain, and drafts on an account in the Farmers State Bank, Lueders, Texas, designated W. L. Marshall, then and there knowing full well that insufficient funds were in and on deposit in said accouts, in said banking institutions, to honor and pay all checks and drafts which the said Len Gardner McCormick and W. L. Marshall had made, uttered and drawn on said accounts.

AGAINST THE PEACE AND DIGNITY OF THE STATE.

/s/ ANN KINGHAM
Foreman of the Grand Jury

APPENDIX G

NO. 1,060,195

IN THE DISTRICT COURT OF
HARRIS COUNTY, TEXAS
215TH JUDICIAL DISTRICT

TEXAS COMMERCE BANK NATIONAL ASSOCIATION

v.

L. G. McCORMICK, BEACON HILL FARMS, INC., W. L. MARSHALL, JR. and JIM NED VALLEY SUPPLY, INC., DOING BUSINESS AS AND - HAVING A DIVISION KNOWN AS JIM NED VALLEY GRAIN

(Filed September 27, 1985)

PLAINTIFF'S SIXTH AMENDED ORIGINAL PETITION

TO SAID HONORABLE COURT:

NOW COMES Texas Commerce Bank National Association, a national banking association, hereinafter called "TCB" or "Plaintiff," and files this its Fifth Amended Original Petition, complaining of L. G. McCormick, Beacon Hill Farms, Inc., W. L. Marshall, Jr. and Jim Ned Valley Supply, Inc., doing business as and having a division known as Jim Ned Valley Grain, hereinafter called "Defendants," and for cause of action would respectfully show the following:

COUNT 1

1.

Plaintiff is a national banking association with its principal office and place of business in Houston, Harris County, Texas. Defendant L. G. McCormick is a resident of Harris County, Texas, and has appeared and answered in this cause. Defendant Beacon Hill Farms, Inc. ("BHF") is a Texas corporation, and has appeared and answered herein. Defendant W. L. Marshall, Jr. is a resident of Taylor County, Texas, and has appeared and answered herein. Defendant Jim Ned Valley Supply, Inc., doing business as and having a division known as Jim Ned Valley Grain ("Jim Ned Valley"), is a Texas corporation, and has appeared and answered herein.

2.

Defendant W. L. Marshall and Jim Ned Valley Supply, Inc., have agreed to a judgment in the principal amount of a total judgment of $2,122,216.00.

3.

Beginning in May, 1973, Defendant BHF maintained checking account No. 014-4212 with Plaintiff. At all material times, Defendant Jim Ned Valley maintained checking account No. 0364150 with Citizens National Bank of Abilene, Texas ("Citizens National"), such account being styled "Jim Ned Valley Grain." Defendants BHF and Jim Ned Valley each maintained checking accounts with other banks, and Defendants W. L. Marshall, Jr. ("Marshall") and L. G. McCormick ("McCormick") maintained checking accounts with various banks.

4.

During a period beginning at least by February, 1974, and continuing into December, 1974, Defendants BHF, Jim Ned Valley, McCormick and Marshall claimed to have engaged in a grain business. They represented that the business was to operate by means of Marshall and Jim Ned Valley buying and selling grain in West Texas, with BHF and McCormick to furnish financing for the venture. Checks and drafts allegedly representing receipts from grain transactions were deposited in BHF's account with TCB and in Jim Ned Valley's account with Citizens National.

5.

Plaintiff would show that McCormick, Marshall, BHF and Jim Ned Valley were engaged in what is commonly known in the banking business as a "check kiting scheme." "Check kiting" has been defined as a "scheme whereby false credit is obtained by passing worthless checks and drafts between two (or more) banks." It involves making a series of "deposits" in various banks; these "deposits" are made up of checks or drafts drawn on an account in some other bank, but where there really is not a sufficient balance in the account against which the deposited items are drawn. What looks like, or appears to be, a balance in the drawee account is not good, collected money, but is instead bank account must then be forwarded to the bank upon which they are drawn, for payment. There will be some delay between the deposit in one bank of items and the final payment of those items by the other bank, upon which they were drawn. For example, the checks must go through the clearinghouse, the Federal Reserve or some other processing system, all of

which takes time. During this period, the deposited items would appear as a "positive" deposit balance in the account where they were deposited. However, this apparent balance is nothing but a paper entry on the bank's books; the deposited checks are uncollected funds until the checks are finally paid by the bank on which they are drawn.

6.

During February-December, 1974, Defendants deposited numerous checks and drafts to the BHF account with TCB, and to the Jim Ned Valley account at Citizens National. Millions of dollars of ostensible funds, the great bulk of which were merely "inter-company transfers" between BHF and Jim Ned Valley, were run through the accounts in this way. That is, BHF would deposit in its account at TCB checks or drafts which purported to be items payable from Jim Ned Valley to BHF, while Jim Ned Valley would deposit in its account at Citizens National checks or drafts which purported to be items payable from BHF to Jim Ned Valley. This was done by using drafts and checks and by wiring funds. From May through November 1974, said Defendants used a third bank, located in Lueders, Texas, in working this scheme.

7.

By using this inter-company transfer device, and because of the above-mentioned delay which naturally results when checks drawn on a bank in one city are deposited in a bank located in another city, said Defendants were able to give the misleading appearance of having substantial amounts of money on deposit with

Plaintiff TCB and with Citizens National. In late November and early December 1974, BHF deposited in its TCB account twenty-two (22) checks issued by Jim Ned Valley and payable to "Santana Grain & Fertilizer" ("the Santana checks"). Although the Santana checks were deposited in BHF's account, BHF's endorsement was not placed on them. The Santana checks subsequently were returned unpaid by Citizens National, marked "Drawn against uncollected funds." When such checks were charged back against the BHF account, an overdraft of more than $730,000.00 resulted, after all recoveries and offsets. Pursuant to the account agreement with the Bank, a true and correct copy of which is attached hereto as Exhibit "A," Defendant BHF agreed to pay any overdrafts to its account.

8.

After this overdraft loss, TCB obtained and reviewed part of the records of said Defendants. Plaintiff thereby discovered that most alleged deposits made by Jim Ned Valley and by BHF were not related to actual purchases and sales of grain, but instead were inter-company transfers which were, in reality, nothing but paper games. In the course of this review, the grain operation of Jim Ned Valley and BHF was considered on a consolidated basis, with adjustments made to eliminate inter-company transfers which did not flow from true purchases or sales of grain. This procedure revealed that in the combined operation, a negative cash balance existed by March 1974, which also meant that "funds" appearing to be in the accounts were not produced by the grain business. This negative cash balance continued to grow; by June 30, 1974, it exceeded $160,000.00. By December 31, this deficit as to real money was more than $600,000.00.

9.

The conspiracy stayed afloat as long as it did only by BHF's depositing to its account unsupported checks and drafts made payable to BHF and drawn against Jim Ned Valley, while on the other end Jim Ned Valley deposited to its account unsupported checks and drafts drawn in its favor against BHF. Through these inter-company paper transfers said Defendants maintained apparent positive balances in their bank accounts, but in terms of true cash the scheme was far underwater. For example, during the month of November, the combined "deposits" of Jim Ned Valley and BHF were more than $7,000,000.00, less than $500,000.00 of which was receipts from sale of grain: the balance of almost $6,500,000.00 was what is known in banking as "funny money."

10.

Throughout the course of the scheme, funds were drawn out of the accounts for the personal use and benefit of the Defendants McCormick and Marshall, and not for the grain business in which they claimed to be engaged. For example, $20,000.00 from the BHF account was paid over to the Federal Deposit Insurance Corporation; this was to pay off a debt owed by Defendant L. G. McCormick to FDIC, not to buy grain. Also, more than $100,000.00 from BHF accounts was transferred directly to L. G. McCormick's accounts. In all, at least $250,-000.00 was transferred from BHF and Jim Ned Valley accounts for the benefit of McCormick or his companies, and at least $200,000.00 was so transferred for the benefit of Marshall or his companies; these transfers were not for the purpose or sale of grain.

11.

Due to said Defendants' wrongful acts as above set forth, Plaintiff has suffered a principal loss of at least $730,000.00, for which said Defendants are jointly and severally liable, having conspired and jointly perpetrated a fraud upon Plaintiff in Harris County, Texas. Defendant L. G. McCormick expressly guaranteed payment of the obligation, but has not performed upon his guaranty. A true and correct copy of the Guaranties executed by McCormick are attached hereto as Exhibits "B," "C" and "D" are incorporated herein by reference. Defendants L. G. McCormick, BHF, W. L. Marshall and Jim Ned Valley Supply have each acknowledged that he or it owes such amount to TCB, and promised to pay. Alternatively, said Defendants are liable, jointly and severally, to Plaintiff for the amount of said loss upon quantum meruit, or an action for debt, or for conversion of checks, or, in the further alternative, upon the legal principle of money had and received. Plaintiff is entitled to recover its attorneys' fees against Defendants, Beacon Hill Farms, Inc. and McCormick, pursuant to Article 2226. Such attorneys' fees greatly exceed the minimum jurisdictional limits of this Court.

12.

By reason of their participating in and benefiting from such fraudulent scheme and practice, said Defendants are jointly and severally liable to Plaintiff. In the alternative, Plaintiff would show that BHF is the alter ego of Defendant L. G. McCormick, and that McCormick is responsible to TCB for all of its losses which are in any way attributable to "Beacon Hill Farms, Inc."; further, McCormick has guaranteed payment of some or all said

debts to the Bank. Similarly in the alternative, Plaintiff would show that Defendant Jim Ned Valley Supply, Inc., doing business as and having a division known as Jim Ned Valley Grain, is the alter ego of Defendant W. L. Marshall, Jr., and that Marshall is responsible to Plaintiff for all its losses which are in any way attributable to "Jim Ned Valley Supply, Inc., doing business as and having a division known as Jim Ned Valley Grain."

13.

In the further alternative, Plaintiff would show that Defendant L. G. McCormick is directly liable to Plaintiff for the loss incurred because of the dishonored checks which were made payable to Santana Grain & Fertilizer, by reason of the following facts. When the twenty-two Santana checks were deposited in BHF's checking account with Plaintiff, there was on file in Harris County, Texas, an assumed name certificate which stated that "Santana Grain & Fertilizer" was an assumed name, or trade name of Santana Petroleum Corporation. Defendant L. G. McCormick was the person who caused this assumed name certificate to be filed. At the time the certificate was filed, and at the time when said checks were deposited and dishonored and returned unpaid, Santana Petroleum Corporation did not have a valid corporate charter. Its charter had been forfeited by law because of failure to pay State of Texas franchise taxes. Defendant McCormick was president and a director of Santana Petroleum Corporation at the time said Santana checks were deposited, dishonored and returned unpaid. Accordingly, McCormick is directly liable to Plaintiff upon such obligations.

14.

Plaintiff also should be awarded exemplary damages from Defendants McCormick, Marshall, Beacon Hill Farms, Inc., and Jim Ned Valley Supply, Inc., doing business as Jim Ned Valley Grain. These Defendants, jointly and severally, acted fraudulently and maliciously toward TCB, engaging in action which they knew was wrongful. Said Defendants engaged in unlawful activity agianst TCB and participated in a conspiracy to defraud it, all of which caused a loss of more than $730,000.00 in principal, to TCB. In connection with their participation in this scheme, Defendants McCormick and Marshall each were indicted in Harris County, Texas, for conspiracy to commit theft. In October, 1976, the Defendant L. G. McCormick was convicted of conspiracy to commit theft in a criminal case styled *State of Texas v. L. G. McCormick,* No. 244,664 in the 176th Criminal District Court of Harris County, Texas. Defendant W. L. Marshall was tried jointly with McCormick; Marshall likewise was convicted of conspiracy to commit theft in a criminal case styled *State of Texas v. W. L. Marshall,* No. 244,663 in the 176th Criminal District Court of Harris County, Texas. As a condition of receiving probation so that he would not be required to serve time in prison, McCormick was ordered to make restitution, that is, repay to TCB the sum of $367,787.00. Except for a small amount of money subsequently seized from him by the Criminal District Court, McCormick has not made restitution as ordered. As a condition to receiving probation so that he would not be required to serve time in prison, Defendant W. L. Marshall, Jr. also was ordered to make restitution. Marshall has not paid any of that amount to TCB. TCB would show that because of their

wrongful, fraudulent and malicious conduct, Defendants Marshall, McCormick, BHF and Jim Ned Valley, and each of them, jointly and severally, should be ordered to pay exemplary, or punitive, damages, in the sum of at least $2,500,000.00.

COUNT 2

SEPARATE COUNT AS TO McCORMICK AND BEACON HILL FARMS, INC.

15.

Prior to discovering said check kiting scheme, TCB made certain loans to BHF; L. G. McCormick guaranteed the prompt payment of such loans. On or about November 22, 1974, for valuable consideration, Defendant BHF made, executed and delivered to Plaintiff a promissory note bearing that date, promising to pay to Plaintiff's order at Houston, Texas, the principal sum of $125,000.00 upon the terms set forth in the note, a copy of which is attached, marked as Exhibit "E" and incorporated herein for all purposes. Said note provided for interest at the stated rate until maturity, at 10% per annum after maturity, and for attorneys' fees equal to 10% of the unpaid balance in event of default. Plaintiff is now the lawful owner and holder of said note. At maturity, March 24, 1975, both accrued interest and the full principal balance were outstanding. No principal payments were made and interest continued to accrue. On May 6, 1976, payments from a source other than Defendants was applied against such indebtedness, reducing the principal balance to $60,300.00, and accrued interest to at least $8,537.50, for an aggregate indebtedness of $68,837.50

owed to Plaintiff at that time. Plaintiff duly requested and demanded payment, but Defendants BHF and McCormick have not paid, to Plaintiff's damage in the amount of $68,837.50, inclusive of interest to May 6, 1976, plus attorneys' fees of 10%, together with interest on such sums at 10% per annum from May 6, 1976, until paid, and all costs of suit.

16.

Prior to execution of said promissory note, for valuable consideration Defendant L. G. McCormick made, executed and delivered to Plaintiff a written, unconditional continuing guaranty of the punctual payment when due of each and every claim, demand, indebtedness, right, or cause of action of every nature whatsoever of TCB against the Defendant BHF. A true copy of such agreements are attached and incorporated as Exhibits "B" and "C." Under said guaranty, McCormick was liable for $125,000.00 of principal, plus interest, and all of Plaintiff's expenses of enforcing the guaranty, including reasonable attorneys' fees. Plaintiff made said loan in reliance upon such guaranty. Said promissory note and guaranty agreement render the Defendants BHF and McCormick jointly and severally liable to Plaintiff for all the amounts above set forth herein and attorneys' fees.

WHEREFORE, PREMISES CONSIDERED, Plaintiff respectfully prays that upon final hearing, Plaintiff Texas Commerce Bank National Association, a national banking association, have and recover judgment of and from Defendants L. G. McCormick and Beacon Hill Farms, Inc., a Texas corporation, jointly and severally, the principal sum of at least $730,000.00, plus interest thereon at the maximum legal rate from December 27, 1974,

until paid; that Plaintiff further have judgment against those Defendants, jointly and severally, for exemplary damages of at least $2,500,000.00; that Plaintiff recover its attorneys' fees, together with interest at the maximum legal rate upon all such sums from date of judgment until paid; that the Interlocutory Judgment against Defendants, W. L. Marshall, Jr. and Jim Ned Valley Supply, Inc. be made final, and that Plaintiff have judgment against the Defendants L. G. McCormick and Beacon Hill Farms, Inc., and each of them, jointly and severally, for the further sum of $68,837.50, plus interest upon such sums at the rate of 10% per annum from May 6, 1976, inclusive of interest to May 6, 1976, together with attorneys' fees equal to 10% of that amount, that no Defendant take anything by any counterclaim, cross-action or other claim herein; that Plaintiff have judgment for all costs incurred herein, and for such other and further orders and relief as may be appropriate in the premises.

Respectfully submitted,

LIDDELL, SAPP, ZIVLEY
& LaBOON

/s/ D. MITCHELL McFARLAND
D. Mitchell McFarland
State Bar No. 13597700
3400 Texas Commerce Tower
Houston, Texas 77002-3045
(713) 226-1200
Attorneys for Plaintiff
Texas Commerce Bank
National Association

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of Plaintiff's Fifth Amended Original Petition was forwarded to John Gilpin, Gilpin, Maynard, Parsons, Pohl & Bennett, Allied Bank Tower, 24th Floor. 1300 Post Oak Boulevard, Houston, Texas 77056 and to Mr. Jack Bryant, P. O. Box 282, Abilene, Texas 79604 by certified mail, return receipt requested on this 27th day of September, 1985.

/s/ D. MITCHELL McFARLAND
D. Mitchell McFarland

TEXAS COMMERCE BANK
NATIONAL ASSOCIATION

Firm Card

Each person or entity (hereinafter called "Customer") executing this instrument shall be deemed to have agreed to all of the terms and provisions contained in paragraph ____ on the reverse side hereof.

Corporation

Signatures:

/s/ L. G. McCORMICK

/s/ HARRY W. PATTERSON

/s/ MRS. RONALD P. GUERCIS

Mailing Address:

#2 Greenway Plaza E, Suite 728, Houston, Tex. 77046

(1) ALL ACCOUNTS

This Bank is hereby authorized to recognize the signatures executed herewith in payment of funds or transactions of any other business of Customer. This Bank acts only as agent for Customer and assumes no liability except for its own negligence. All items, if credited, are credited conditionally, subject to final payment, and checks drawn against such conditional credits may be refused. This Bank and or subsequent collecting banks or agents may present or send items for payment direct to the bank on which drawn or at which payable, or to another bank or agent, and may accept either cash, draft or check in payment for such items, and will not be liable for collection of drafts or checks so received. Each collecting agent is the agent of Customer, but no agent shall be liable for any loss growing out of the negligence, default or failure of another agent. Should returns on items be not received in a reasonable time, or should any item or any draft or check received by this Bank and or collecting agent in payment therefor, not be paid; or should any agent fail to remit the proceeds of such item, draft or check; or should items drawn on this Bank not be good within the time limits established for such items by the applicable law, rules and regulations, this Bank may charge such items back to Customer. Items lost in mail or chargeable back to Customer for any other cause may be charged back whether or not the item itself can be returned. Items drawn upon or by another bank or person in this city may be presented or cleared through the Houston Clearing House Association or its successor under its rules as then existing, or may be presented as directed by Customer. Items may be handled under existing or future rules and regulations of the Federal Reserve Board, and

or any Federal Reserve Bank to which forwarded. Should any claim be made by any party against this Bank as to any item by reason of handling same on the above terms, or because these terms were not binding on such party, Customer agrees to indemnify this Bank against liability or loss because of such claim. Should any overdraft occur in Customer's account, Customer agrees forthwith to pay such overdraft to Bank together with this Bank's usual charge and its standard interest in effect at the time. Customer will be charged with a service charge in accordance with the schedule of service charges of this Bank as altered and amended from time to time. Exchange, postage and all other special expenses incurred by this Bank in handling or collecting items will be charged to Customer. It is agreed that this Bank will not be liable for any damage caused by its premature payment, through accident or inadvertence, of a postdated check, whether such damages arise from dishonor of checks subsequently presented, or otherwise. It is further agreed that this Bank shall have all the rights of a purchaser and holder in due course of a postdated check for which it pays out money or gives other value, in good faith, before the date of the instrument. All stoppayment orders must be in writing, dated, signed and must describe the item with certainty. An order is effective for only 6 months unless renewed in writing. This account is subject to the laws, regulations and rules of the United States, the State of Texas, and this Bank now or hereafter in force.

(2) PARTNERSHIP ACCOUNT

The Partners, whose signatures appear on the reverse side hereof, agree on behalf of themselves and their firm (hereinafter called "Customer") as follows:

This is a Partnership Account. All checks, drafts, notes, certificates, acceptances, and other items (hereinafter called "Items") and money deposited in this Account belong to the Customer. The Partners are general partners of the Customer and (except as may be expressly limited) each of them has the power and authority to act, sign and bind the Customer without limitation. The above described power and authority of each of the Partners shall continue in full force and effect until actual written notice of revocation is received by the Bank from one of the Partners, whether the same be brought about by dissolution of the Customer or otherwise.

(3) TRADE NAME

It is declared by the Proprietor that the firm is an unincorporated business owned wholly and exclusively by the Proprietor. This Bank is authorized to honor checks, drafts, orders and other withdrawals against this Trade Name Account when bearing signature(s) of those authorized herein.

Checks, drafts, notes, bills of exchange and orders for the payment of money may be endorsed by the above described parties deposited with you for the credit of said account.

Proprietor authorizes and requests you to pay and charge to said account checks, obligations and orders for the payment of money drawn on or payable at, or which shall be paid or honored by Bank when so signed whether payable to the order of any said signers or not; and further authorizes and requests you to receive deposits and conduct the said account in accordance with the instructions stated above and stated on the authorized signature card filed with you by the Proprietor.

The above instructions are to remain in effect until further order in writing from the Proprietor. Proprietor agrees to inform you promptly of any changes in the status of said business.

The Proprietor further certifies that an Assumed Name Certificate in accordance with the foregoing representations is on file in the Office of the County Clerk of Harris County, Texas, as required by law.

EXHIBIT A

BEACON HILL FARMS, INC. #014-4212

TEXAS COMMERCE BANK
NATIONAL ASSOCIATION

Firm Card

Each person or entity (hereinafter called "Customer") executing this instrument shall be deemed to have agreed to all of the terms and provisions contained in paragraph ____ on the reverse side hereof.

Corporation

Signatures:

/s/ L. G. McCORMICK

/s/ ANN MARIE SMITH

Date: 5-22-73

Amount: $9000.00

Intro. By: C.W.G.

Officer: E.H.D.

Rec. By: DAJ Apr. 29, 1974

Authorization Dated: Rev. 4-22-74

Mailing Address:

#2 Greenway Plaza E, Suite 728, Houston 77046

*NOTE: THIS CARD FOR SIGNATURE CHANGE ONLY

(1) ALL ACCOUNTS

This Bank is hereby authorized to recognize the signatures executed herewith in payment of funds or transactions of any other business of Customer. This Bank acts only as agent for Customer and assumes no liability except for its own negligence. All items, if credited, are credited conditionally, subject to final payment, and checks drawn against such conditional credits may be refused. This Bank and or subsequent collecting banks or agents may present or send items for payment direct to the bank on which drawn or at which payable, or to another bank or agent, and may accept either cash, draft or check in payment for such items, and will not be liable for collection of drafts or checks so received. Each collecting agent is the agent of Customer, but no agent shall be liable for any loss growing out of the negligence, default or failure of another agent. Should returns on items be not received in a reasonable time, or should any item or any draft or check received by this Bank and or collecting agent in payment therefor, not be paid; or should any agent fail to remit the proceeds of such item, draft or check; or should items drawn on this Bank not be good within the time limits established for such items by the applicable law, rules and regulations, this Bank may charge such items back to Customer. Items lost in mail or chargeable back to Customer for any other cause may be charged back whether or not the item itself can be returned. Items drawn upon or by another bank or person in this city may be presented or cleared through the Houston Clearing House Association or its successor under its rules as then existing, or may be presented as directed by Customer. Items may be handled under existing or future rules and regulations of the Federal Reserve Board, and

or any Federal Reserve Bank to which forwarded. Should any claim be made by any party against this Bank as to any item by reason of handling same on the above terms, or because these terms were not binding on such party, Customer agrees to indemnify this Bank against liability or loss because of such claim. Should any overdraft occur in Customer's account, Customer agrees forthwith to pay such overdraft to Bank together with this Bank's usual charge and its standard interest in effect at the time. Customer will be charged with a service charge in accordance with the schedule of service charges of this Bank as altered and amended from time to time. Exchange, postage and all other special expenses incurred by this Bank in handling or collecting items will be charged to Customer. It is agreed that this Bank will not be liable for any damage caused by its premature payment, through accident or inadvertence, of a postdated check, whether such damages arise from dishonor of checks subsequently presented, or otherwise. It is further agreed that this Bank shall have all the rights of a purchaser and holder in due course of a postdated check for which it pays out money or gives other value, in good faith, before the date of the instrument. All stoppayment orders must be in writing, dated, signed and must describe the item with certainty. An order is effective for only 6 months unless renewed in writing. This account is subject to the laws, regulations and rules of the United States, the State of Texas, and this Bank now or hereafter in force.

(2) PARTNERSHIP ACCOUNT

The Partners, whose signatures appear on the reverse side hereof, agree on behalf of themselves and their firm (hereinafter called "Customer") as follows:

This is a Partnership Account. All checks, drafts, notes, certificates, acceptances, and other items (hereinafter called "Items") and money deposited in this Account belong to the Customer. The Partners are general partners of the Customer and (except as may be expressly limited) each of them has the power and authority to act, sign and bind the Customer without limitation. The above described power and authority of each of the Partners shall continue in full force and effect until actual written notice of revocation is received by the Bank from one of the Partners, whether the same be brought about by dissolution of the Customer or otherwise.

(3) TRADE NAME

It is declared by the Proprietor that the firm is an unincorporated business owned wholly and exclusively by the Proprietor. This Bank is authorized to honor checks, drafts, orders and other withdrawals against this Trade Name Account when bearing signature(s) of those authorized herein.

Checks, drafts, notes, bills of exchange and orders for the payment of money may be endorsed by the above described parties deposited with you for the credit of said account.

Proprietor authorizes and requests you to pay and charge to said account checks, obligations and orders for the payment of money drawn on or payable at, or which shall be paid or honored by Bank when so signed whether payable to the order of any said signers or not; and further authorizes and requests you to receive deposits and conduct the said account in accordance with the instructions stated above and stated on the authorized signature card filed with you by the Proprietor.

The above instructions are to remain in effect until further order in writing from the Proprietor. Proprietor agrees to inform you promptly of any changes in the status of said business.

The Proprietor further certifies that an Assumed Name Certificate in accordance with the foregoing representations is on file in the Office of the County Clerk of Harris County, Texas, as required by law.

EXHIBT B

CONTINUING GUARANTY

IN CONSIDERATION of credit and financial accommodations extended, to be extended or continued to Beacon Hill Farms, Inc., hereafter called the "Borrower", by TEXAS COMMERCE BANK NATIONAL ASSOCIATION, hereinafter called the "Bank", and for other good and valuable considerations, I, We, and each of us, the undersigned, have jointly, severally and unconditionally guaranteed and do hereby jointly, severally and unconditionally guarantee to the Bank the payment of each and every claim, demand, indebtedness, right or cause of action of every nature whatsoever against the Borrower now or hereafter existing, due or to become due to, and now or hereafter held by the Bank to the extent of one hundred seventy two thousand and no/100 Dollars of principal, and in addition, interest, accrued and accuring on such principal together with any and all expenses incurred by the bank in enforcing this guaranty, including reasonable attorneys fees. This is a continuing guaranty, and all extensions of credit and financial accommodations heretofore, concurrently herewith or hereafter made by the Bank to the Borrower and all indebtedness of the Borrower now owned or hereafter acquired by the Bank shall be conclusively presumed to have been made or acquired in acceptance hereof.

The undersigned waive notice of acceptance of this guaranty and of any liability to which it applies or may apply, and waive presentment, demand of payment, notice of dishonor or non-payment, collecting, suit, or taking any other action by the Bank, and giving any notice of default or other notice to, or making any demand on,

any party. Payment by the undersigned shall be made at the main office of the Bank, in Houston, Texas.

The obligations of the undersigned under this guaranty shall not be affected by any invalidity of or defect or deficiency in any promissory note, loan agreement, security agreement, deed of trust or other instrument, whether similar or dissimilar, issued in connection with, evidencing or securing payment of any indebtedness guaranteed by this instrument.

This is an absolute guaranty of payment and not of collection, and the undersigned waive any right to require that any action be brought against the Borrower or any other person. Should the Bank seek to enforce the obligations of the undersigned hereunder by action in any court, the undersigned waive any necessity, substantive or procedural, that a judgment previously be rendered against the Borrower or any other person, or that any action be brought against the Borrower or any other person, or that the Borrower or any other person should be joined in such cause; the obligations of the undersigned assumed hereunder are joint and several from the Borrower or any other person, and are primary obligations concerning which the undersigned are principal obligors. Such waiver shall be without prejudice to the Bank at its option to proceed against the Borrower or any other person, whether by separate action or by joinder. The undersigned agree that this guaranty shall not be discharged except by complete performance of the obligations of the Borrower and the obligations of the undersigned hereunder. The obligations of the undersigned hereunder shall not be affected in any way by any receivership, insolvency, bankruptcy or other proceedings affecting the Borrower or any of the Borrower's assets, or the

release or discharge of the Borrower from the performance of any obligation contained in any promissory note or other instrument issued in connection with, evidencing or securing any indebtedness guaranteed by this instrument, whether occurring by reason of law or any other cause, whether similar or dissimilar to the foregoing.

The Bank may, at any time without the consent of, or notice to the undersigned, without incurring responsibility to the undersigned, without impairing or releasing the obligations of the undersigned, upon or without any terms or conditions and in whole or in part, (1) change the manner, place or terms of payment or change or extend the time of payment of, renew, or alter any liability of the Borrower hereby guaranteed, or any liabilities incurred directly or indirectly hereunder, and the guaranty herein made shall apply to the liabilities of the Borrower, changed, extended, renewed or altered in any manner, (2) sell, exchange, release, surrender, realize upon or otherwise deal with in any manner and in any order any property at any time standing as security for the liabilities hereby guaranteed or any liabilities incurred directly or indirectly hereunder or any set-off against any of said liabilities, (3) exercise or refrain from exercising any rights against the Borrower or others, or otherwise act or refrain from acting, (4) settle or compromise any liabilities hereby guaranteed or hereby incurred, and may subordinate the payment of all or any part of such liabilities to the payment of any liabilities which may be due to the Bank or others, and, (5) apply any sums paid to any liability or liabilities of the Borrower to the Bank regardless of what liability or liabilities of the Borrower to the Bank remain unpaid.

As to each of the undersigned, this guaranty shall continue until written notice of revocation signed by the undersigned, or until written notice of the death of such undersigned shall have been actually delivered to the President or one of the Vice Presidents of the Bank, notwithstanding a revocation by, or the death of, or complete or partial release for any cause of any one or more of the remainder of the undersigned, or of the Borrower or of any one liable in any manner for the liabilities (including those hereunder) incurred directly or indirectly in respect thereof or hereof, and notwithstanding the dissolution, termination, or change in personnel, of any one or more of the undersigned. No revocation or termination hereof shall affect in any manner rights arising under this guaranty with respect to liabilities arising prior to receipt of such written notice, and the sole effect of revocation or termination shall be to exclude from this guaranty liabilities thereafter arising which are unconnected with liabilities theretofore arising or transactions theretofore entered into.

No delay on the part of the Bank in exercising any right hereunder or failure to exercise the same shall operate as a waiver of such right, nor in any event shall any modification or waiver of the provisions of this guaranty be effective unless in writing; nor shall any such waiver be applicable except in the specific instance for which given.

The undersigned, if more than one, shall be jointly and severally liable hereunder and the term "undersigned" shall mean the undersigned or any one or more of them. Any one signing this guaranty shall be bound hereby, whether or not any other party signs this guaranty or is

released therefrom at any time. This guaranty is binding upon the respective heirs, executors, administrators, successors and assigns of the undersigned.

WITNESS our hands at Houston, Texas, this the 25th day of July, 1974.

/s/ L. G. McCORMICK
L. G. McCormick

WITNESSES:

EXHIBIT C

CONTINUING GUARANTY

IN CONSIDERATION of credit and financial accommodations extended, to be extended or continued to Beacon Hill Farms, Inc., hereinafter called the "Borrower", by TEXAS COMMERCE BANK NATIONAL ASSOCIATION, hereinafter called the "Bank", and for other good and valuable considerations, I, We, and each of us, the undersigned, have jointly, severally and unconditionally guaranteed and do hereby jointly, severally and unconditionally guarantee to the Bank the payment of each and every claim, demand, indebtedness, right or cause of action of every nature whatsoever against the Borrower now or hereafter existing, due or to become due to, and now or hereafter held by the Bank to the extent of one hundred seventy two thousand and no/100 Dollars of principal, and in addition, interest, accrued and accuring on such principal together with any and all expenses incurred by the bank in enforcing this guaranty, including reasonable attorneys fees. This is a continuing guaranty, and all extensions of credit and financial accommodations heretofore, concurrently herewith or hereafter made by the Bank to the Borrower and all indebtedness of the Borrower now owned or hereafter acquired by the Bank shall be conclusively presumed to have been made or acquired in acceptance hereof.

The undersigned waive notice of acceptance of this guaranty and of any liability to which it applies or may apply, and waive presentment, demand of payment, notice of dishonor or non-payment, collecting, suit, or taking any other action by the Bank, and giving any notice of default or other notice to, or making any demand on,

any party. Payment by the undersigned shall be made at the main office of the Bank, in Houston, Texas.

The obligations of the undersigned under this guaranty shall not be affected by any invalidity of or defect or deficiency in any promissory note, loan agreement, security agreement, deed of trust or other instrument, whether similar or dissimilar, issued in connection with, evidencing or securing payment of any indebtedness guaranteed by this instrument.

This is an absolute guaranty of payment and not of collection, and the undersigned waive any right to require that any action be brought against the Borrower or any other person. Should the Bank seek to enforce the obligations of the undersigned hereunder by action in any court, the undersigned waive any necessity, substantive or procedural, that a judgment previously be rendered against the Borrower or any other person, or that any action be brought against the Borrower or any other person, or that the Borrower or any other person should be joined in such cause; the obligations of the undersigned assumed hereunder are joint and several from the Borrower or any other person, and are primary obligations concerning which the undersigned are principal obligors. Such waiver shall be without prejudice to the Bank at its option to proceed against the Borrower or any other person, whether by separate action or by joinder. The undersigned agree that this guaranty shall not be discharged except by complete performance of the obligations of the Borrower and the obligations of the undersigned hereunder. The obligations of the undersigned hereunder shall not be affected in any way by any receivership, insolvency, bankruptcy or other proceedings affecting the Borrower or any of the Borrower's assets, or the

release or discharge of the Borrower from the performance of any obligation contained in any promissory note or other instrument issued in connection with, evidencing or securing any indebtedness guaranteed by this instrument, whether occurring by reason of law or any other cause, whether similar or dissimilar to the foregoing.

The Bank may, at any time without the consent of, or notice to the undersigned, without incurring responsibility to the undersigned, without impairing or releasing the obligations of the undersigned, upon or without any terms or conditions and in whole or in part, (1) change the manner, place or terms of payment or change or extend the time of payment of, renew, or alter any liability of the Borrower hereby guaranteed, or any liabilities incurred directly or indirectly hereunder, and the guaranty herein made shall apply to the liabilities of the Borrower, changed, extended, renewed or altered in any manner, (2) sell, exchange, release, surrender, realize upon or otherwise deal with in any manner and in any order any property at any time standing as security for the liabilities hereby guaranteed or any liabilities incurred directly or indirectly hereunder or any set-off against any of said liabilities, (3) exercise or refrain from exercising any rights against the Borrower or others, or otherwise act or refrain from acting, (4) settle or compromise any liabilities hereby guaranteed or hereby incurred, and may subordinate the payment of all or any part of such liabilities to the payment of any liabilities which may be due to the Bank or others, and, (5) apply any sums paid to any liability or liabilities of the Borrower to the Bank regardless of what liability or liabilities of the Borrower to the Bank remain unpaid.

As to each of the undersigned, this guaranty shall continue until written notice of revocation signed by the undersigned, or until written notice of the death of such undersigned shall have been actually delivered to the President or one of the Vice Presidents of the Bank, notwithstanding a revocation by, or the death of, or complete or partial release for any cause of any one or more of the remainder of the undersigned, or of the Borrower or of any one liable in any manner for the liabilities (including those hereunder) incurred directly or indirectly in respect thereof or hereof, and notwithstanding the dissolution, termination, or change in personnel, of any one or more of the undersigned. No revocation or termination hereof shall affect in any manner rights arising under this guaranty with respect to liabilities arising prior to receipt of such written notice, and the sole effect of revocation or termination shall be to exclude from this guaranty liabilities thereafter arising which are unconnected with liabilities theretofore arising or transactions theretofore entered into.

No delay on the part of the Bank in exercising any right hereunder or failure to exercise the same shall operate as a waiver of such right, nor in any event shall any modification or waiver of the provisions of this guaranty be effective unless in writing; nor shall any such waiver be applicable except in the specific instance for which given.

The undersigned, if more than one, shall be jointly and severally liable hereunder and the term "undersigned" shall mean the undersigned or any one or more of them. Any one signing this guaranty shall be bound hereby, whether or not any other party signs this guaranty or is

released therefrom at any time. This guaranty is binding upon the respective heirs, executors, administrators, successors and assigns of the undersigned.

WITNESS our hands at Houston, Texas, this the 22nd day of November, 1974.

/s/ L. G. McCORMICK
L. G. McCormick

WITNESSES:

EXHIBIT D

TEXAS COMMERCE BANK
National Association
P. O. Box 2558
Houston, Texas 77001
(713) 236-5304

January 20, 1975

Mr. L. G. McCormick
2016 Main, Suite 1214
Houston, Texas 77002

Dear Tuffy:

This is to confirm and evidence the agreements reached during our meeting with you this morning. At that time it was agreed, and the parties hereby agree, as follows:

(1) Texas Commerce Bank ("the Bank") will give L. G. McCormick ("McCormick") access to its books and records concerning an indebtedness in the amount of $735,574.01 owed by Beacon Hill Farms, Inc. ("Beacon Hill") to the Bank, and arising from an overdraft in the checking account of Beacon Hill. McCormick will give the Bank access to his books and records and those of Beacon Hill, Santana Petroleum Corporation, and Santana Grain and Fertilizer, pertaining to such debt;

(2) McCormick guarantees the prompt payment when due of such $735,574.01, plus interest, owed by Beacon Hill to the Bank;

(3) To the extent McCormick pays the Bank any part of the indebtedness of $735,574.01, as to the amount paid the Bank will assign to McCormick the Bank's rights against third parties; however, any such assignment to McCormick shall be subordinate and inferior to the Banks rights until all of the $735,574.01 shall have been paid to the Bank.

If this correctly states our understanding and agreement, please note your approval and agreement in the space provided below.

Very truly yours,

TEXAS COMMERCE BANK
NATIONAL ASSOCIATION

By: /s/ CARL GALLOWAY
Carl Galloway, Senior Vice Pres.

APPROVED AND AGREED TO:

/s/ L. G. McCORMICK
L. G. McCormick

January 22, 1975
Date

EXHIBIT E

$125,000.00 CG HOUSTON, TEXAS, November 22, 1974, DUE March 24, 1975 NO. 9013 ON OR BEFORE one hundred twenty two (122) days AFTER DATE I, WE OR EITHER PROMISE TO PAY TO THE ORDER OF TEXAS COMMERCE BANK, NATIONAL ASSOCIATION AT ITS OFFICE IN HOUSTON, TEXAS, OF -one hundred twenty five thousand and no/100- DC TOGETHER WITH INTEREST ON THE UNPAID BALANCE THEREOF AT THE RATE OF 12% PERCENT PER ANNUM FROM DATE MATURITY AND AT THE RATE OF TEN PER CENT (10%) PER ANNUM FROM MATURITY UNTIL PAID.

If default is made in the payment of this note and it is placed in the hands of an attorney for collection or collected through probate or bankruptcy court or if suit is brought on this note, the maker or makers hereof agree to pay ten per cent (10%) additional on the amount hereof, both principal and interest with stipulated attorneys' fees.

The owner or holder hereof may, at its or his option, accelerate the date of payment of this note, including principal and accrued interest, when it orders payment hereof to be insecure.

Each maker hereof and any and all endorsers, guarantors and sureties severally waive grace, demand, presentment for payment, notice of dishonor or protest and notice of protest, diligence in collecting and the bringing of suit against any party hereto, and agree to all renewals, extensions or partial payments or to any release or substitution of security herefor, in whole or in part, with or without notice, before or after maturity.

Beacon Hill Farms, Inc.

By: /s/ L. G. McCORMICK
2016 Main, Suite 1214
Houston, Texas 77002
Telephone: 014-4212

APPENDIX H

DEFENDANT'S BILL OF EXCEPTIONS

MR. GILPIN: Comes now your defendant and counter-claimant, L. G. McCormick and Beacon Hill Farms, out of the presence of the jury, and would tender certain evidence on a Bill of Exceptions to the Court, said evidence being as follows:

LEN G. McCORMICK

DIRECT EXAMINATION BY MR. GILPIN:

Q. State your name, please, sir.

A. My name is Len Gardner McCormick.

Q. And in 1976, in October of 1976, were you tried in the criminal courts on a charge—

A. Yes, sir, I was.

Q. Were you represented by counsel during that trial?

A. Mr. Frank Briscoe.

Q. And did you take the witness stand during that trial?

A. I did not.

Q. How was that decision arrived at?

A. By my attorney, Mr. Briscoe.

Q. What reasons were given for not taking the stand?

A. I don't know. You would have to ask Mr. Briscoe.

Q. With regard to that, did you have any criticism of the selection of jurors?

A. Yes, sir. I wasn't pleased.

Q. What was your reason for that?

A. When we were doing the voir dire of the jurors, one little lady who was doing graduate work at Rice said she was very allergic to smoke. And there was quite a bit

of smoke in the room. And the Judge said, "I have no objections to her being excused. Do you, Mr. District Attorney?" The district attorney said, "No." And the Judge said, "Do you, Mr. Briscoe?" And he said, "Yes, I think she should serve."

Q. Did she ultimately serve?

A. Yes, sir. She served.

Q. With regard to the cross-examination of Ann Marie Smith, were you satisfied with the way—

A. I disagreed with it.

Q. Why?

A. Well, I tried to get him to talk with her and investigate her before the trial. And he went out and spent just a few minutes with her and left a day or two before the trial. When he got her on the stand and he said, "I just, I am just not going to cross-examine her. She is a lady scorned, and no telling what will happen."

He just didn't do it. Asked her very few questions, didn't ask her why she was changing her story, or what she had told me all the way through.

Q. And as to the idea that she was a woman scorned, to use that phrase, then scorned or left by you to marry your wife, was that aspect of cross-examination brought out at all?

A. It was never brought out or asked.

Q. With regard to the judgments, what is the conviction for?

A. For conspiracy to commit theft.

Q. And—

A. Not check kiting.

Q. What is the term? What is the sentence assessed to you?

A. It was assessed—do you want me to read it? Is that what you want me to read?

Q. Yes.

A. It's a suspended criminal conspiracy for ten years and $5,000 fine, suspended.

Q. All right.

A. Excuse me, the word probate—it didn't say suspended, the sentence can be probated.

Q. The sentence can be probated?

A. And the next one here—

Q. All right. Then did you question your counsel's zeal during this trial?

A. I could hardly do it. He wouldn't talk to us at lunch and wouldn't meet with me before the trial or anytime.

Q. Did you question his interest in prosecuting your counterclaim against Texas Commerce Bank?

A. Yes, sir, I did.

Q. Was there any reason he couldn't give you an answer?

A. He had to run off and do something else. He was preparing to run for mayor of Houston.

Q. Mr. Love, I think you testified in open court, indicated to you that the bank would turn it over to the proper authorities.

A. Yes, sir. That's correct.

Q. This indebtedness?

A. Yes, sir.

Q. Was there later a news story that appeared relating to Mr. Briscoe?

MR. McFARLAND: What's the date?

MR.GILPIN: It's undated.

A. I don't have the date, sir. He was a mayoral candidate, being honored at a reception at 5:00 p.m., "at the Ramada Club in the First City National Bank Building.

Among the sponsors are Ralph O'Connor, President of Highland Resources; Tom Robinson, Senior Chairman of First Mortgage Company; Ben Love, Chairman of the Board of Texas Commerce Bank; Charles Sapp, partner in the law firm of Liddell, Sapp & Zivley; Robert Herring, Board Chairman of Houston Natural Gas Corporation; Don Hall, the President of the Homebuilders Big 50 Club; N. W. 'Dick' Freeman, Board Chairman of Tenneco, and oilman Harry Hunt."

MR. GILPIN: We have offered this Defendant's 8 as an exhibit on the Bill.

That concludes my offer from this witness.

MR. McFARLAND: I have cross-examination on the Bill, Your Honor.

BILL OF EXCEPTIONS CROSS EXAMINATION

BY MR. McFARLAND:

Q. The Frank Briscoe you refer to is the former district attorney for Harris County?

A. Yes, sir.

Q. And the lawyers prosecuting the case for the county is Mr. Johnny Holmes, who is currently the district attorney for the County?

A. Yes, sir.

Q. And other prosecuting attorneys were Mr. Sam Roberts in the Court of Appeals?

A. Yes, sir.

Q. Mr. McCormick, you were also a licensed attorney, licensed to practice law at the time of the criminal trial, were you not, sir?

A. That's right.

Q. You did not terminate Mr. Briscoe as your attorney the time that you became dissatisfied with his services?

A. I terminated him as soon as the trial was over, because I have any money for an appeal, flat out of money.

Q. You did not appeal this case?

A. I did make a motion to appeal. I didn't have the money to pay the transcript or afford it or hire somebody.

Q. You didn't file a pauper's affidavit to get the transcript made by the County for you?

A. No, sir, I did not.

Q. How many attorneys have you had in this civil case?

A. Mr. Jim Kronzer represented me until he needed to have cash that I didn't have.

Q. Who is John Stock?

A. I think he worked with Kronzer.

Q. And Cantey, who is Craig Cantey?

A. Craig Cantey was my attorney until he quit the practice of law and moved out of town.

Q. Then Mr. Gilpin?

A. Mr. Gilpin.

Q. Has Mr. Mike Ramsey represented you?

A. Mr. Mike Ramsey has represented me the last few years hearing we might have in the criminal matter.

Q. He is a criminal lawyer?

A. Yes, sir.

MR. McFARLAND: No further questions of this witness.

* * *

APPENDIX I

NO. 1,060,195

IN THE DISTRICT COURT OF
HARRIS COUNTY, TEXAS
215th JUDICIAL DISTRICT

TEXAS COMMERCE BANK,
National Association

v.

L. G. McCORMICK, BEACON HILL FARMS, INC., W. L. MARSHALL, JR. AND JIM NED VALLEY SUPPLY, INC., D/B/A AND HAVING A DIVISION KNOWN AS JIM NED VALLEY GRAIN

(Filed March 27, 1986)

CHARGE OF THE COURT

This case is submitted to you on special issues consisting of specific questions about the facts, which you must decide from the evidence you have heard in this trial. You are the sole judges of the credibility of the witnesses and the weight to be given their testimony, but in matters of law, you must be governed by the instructions in this charge. In discharging your responsibility on this jury, you will observe all the instructions which have previously been given you. I shall now give you additional instructions which you should carefully and strictly follow during your deliberations.

1. Do not let bias, prejudice or sympathy play any part in your deliberations.

2. In arriving at your answers, consider only the evidence introduced here under oath and such exhibits, if any, as have been introduced for your consideration under the rulings of the Court, that is, what you have seen and heard in this courtroom, together with the law as given you by the court. In your deliberations, you will not consider or discuss anything that is not represented by the evidence in this case.

3. Since every answer that is required by the charge is important, no juror should state or consider that any required answer is not important.

4. You must not decide who you think should win, and then try to answer the questions accordingly. Simply answer the questions, and do not discuss nor concern yourselves with the effect of your answers.

5. You will not decide an issue by lot or by drawing straws, or by any other method of chance. Do not return a quotient verdict. A quotient verdict means that the jurors agree to abide by the result to be reached by adding together each juror's figure and dividing by the number of jurors to get an average. Do not do any trading on your answers; that is, one juror should not agree to answer a certain question one way if others will agree to answer another question another way.

6. You may render your verdict upon the vote of ten or more members of the jury. The same ten or more of you must agree upon all of the answers made and to the entire verdict. You will not, therefore, enter into an agreement to be bound by a majority or any other vote of less

than ten jurors. If the verdict and all answers therein are reached by unanimous agreement, the foreman shall sign the verdict for the entire jury. If any juror disagrees as to any answer made by the verdict, those jurors who agree to all findings shall each sign the verdict.

These instructions are given you because your conduct is subject to review the same as that of the witnesses, parties, attorneys and the judge. If it should be found that you have disregarded any of these instructions, it will be jury misconduct and it may require another trial by another jury; then all of our time will have been wasted.

The foreman or any other juror who observes a violation of the court's instructions shall immediately warn the one who is violating the same and caution the juror not to do so again.

After you retire to the jury room, you will select your own foreman. The first thing the foreman will do is to have this complete charge read aloud and then you will deliberate upon your answers to the questions asked:

It is the duty of the foreman:

1. to preside during your deliberations;

2. to see that your deliberations are conducted in an orderly manner and in accordance with the instructions in this charge;

3. to write out and hand to the bailiff any communication concerning the case which you desire to have delivered to the judge;

4. to vote on the issues;

5. to write your answers to the issues in the spaces provided; and

6. to certify to your verdict in the space provided for the foreman's signature or to obtain the signatures of all the jurors who agree with the verdict if your verdict is less than unanimous.

After you have retired to consider your verdict, no one has any authority to communicate with you except the bailiff of this Court. You should not discuss the case with anyone, not even with other members of the jury, unless all of you are present and assembled in the jury room. Should anyone attempt to talk to you about the case before the verdict is returned, whether at the courthouse, at your home, or elsewhere, please inform the judge of this fact.

When you have answered all of the questions which you are required to answer under the instructions of the judge, and your foreman has placed your answers in the spaces provided, and signed the verdict as foreman or obtained the signatures, you will advise the bailiff at the door of the jury room that you have reached a verdict, and then you will return into Court with your verdict.

/s/ EUGENE CHAMBERS
Judge Presiding

By the term "Preponderance of the evidence" as used in this Charge, is meant the greater weight and degree of credible evidence before you.

"Ordinary Care" means that degree of care which would be used by a person of ordinary prudence under the same or similar circumstances.

"Negligence" means failure to use ordinary care; that is to say, failure to do that which a person of ordinary prudence would have done under the same or similar circumstances, or doing that which a person of ordinary prudence would not have done under the same or similar circumstance.

"Proximate Cause" means that cause which, in a natural and continuous sequence, produces an event, and without which cause such event would not have occurred; and in order to be a proximate cause, the act or omission complained of must be such that a person using ordinary care would have foreseen that the event, or some similar event, might reasonably result therefrom. There may be more than one proximate cause of an event.

An "officer" of a corporation is a person duly authorized by the corporation to act in any of the following capacities:

(a) President;
(b) Vice President;
(c) Secretary; or
(d) Treasurer; or
(e) Assistant Secretary

"Employee" means a person in the service of another under a contract of hire, express or implied, oral or written, whereby the employer has the right to direct the means or details of the work and not merely the result to be accomplished.

General Instructions

1. *"Santana" checks.* As used in these special issues the term "Santana" checks shall generally mean and refer to the 22 checks deposited into the account of Beacon Hill Farms, Inc. at Texas Commerce Bank on November 27, 1974 through December 4, 1974 that were drawn on the Jim Ned Valley Grain account at Citizens National Bank in Abilene and payable to the order of Santana Grain & Fertilizer.

SPECIAL ISSUE NO. 1

Do you find from a preponderance of the evidence that Beacon Hill Farms, Inc., agreed that should any overdraft occur in its account, it would pay the overdraft together with Texas Commerce Bank's usual charge and standard interest rate prevailing at the time? Answer "we do" or "we do not."

Answer: We do

Instruction: You are instructed that the term "overdraft" means an occurrence where at a given point in time more money is withdrawn from an account than is deposited into such account.

SPECIAL ISSUE NO. 2

Do you find from a preponderance of the evidence that L. G. McCormick or Beacon Hill Farms, Inc. engaged in a "check kiting" scheme? Answer "we do" or "we do not."

a. L. G. McCormick we do
b. Beacon Hill Farms? we do

Instruction: You are instructed that the term "check kiting" means a process where checks written on one account where the funds are insufficient to cover them are continually covered with deposits of checks written on one or more accounts with insufficient funds.

SPECIAL ISSUE NO. 3

Do you find from a preponderance of the evidence that L. G. McCormick conspired with another person to conduct a "check kiting" scheme? Answer "we do" or "we do not."

Answer: we do

Instruction: You are instructed that to find a conspiracy you must find: (1) two or more persons; (2) an object to be accomplished; (3) a meeting of minds on the object or course of action; (4) one or more unlawful, overt acts; and (5) damages as the proximate result.

SPECIAL ISSUE NO. 4

If you have answered Issue Nos. 2 or 3 "We do," then answer the following:

Do you find from a preponderance of the evidence that the "check kiting" scheme was the proximate cause of damages to Texas Commerce Bank? Answer "we do" or "we do not."

Answer: we do

Instruction: You are instructed that the term "proximate cause" means that cause which, in a natural and continuous sequence, produces an event, and without which cause such event would not have occurred. There may be more than one "proximate cause" of an event.

SPECIAL ISSUE NO. 5

What sum, if any, if now paid in cash, do you find by a preponderance of the evidence would fairly and reasonably compensate Texas Commerce Bank for its damages, if any, which were proximately cause as a result of the "check kiting" scheme, if any? Answer in dollars and cents, if any.

Answer: $864,000.00

SPECIAL ISSUE NO. 6

What sum of money, if any, do you find from a preponderance of the evidence should be awarded to Texas Commerce Bank as exemplary damages? Answer in dollars and cents.

Answer:

As against L. G. McCormick: $0.00
As against Beacon Hill Farms: $0.00

Instruction: You are instructed that the term "exemplary damages" means an amount which you may in your discretion award as an example to others and as a penalty or by way of punishment, in addition to any amount which may have been found by you as actual damages. You are further instructed that exemplary damages may be awarded where a party has been shown to have acted willfully, maliciously or fraudulently.

SPECIAL ISSUE NO. 7

Do you find from a preponderance of the evidence that L. G. McCormick and/or Beacon Hill Farms has re-

ceived money which belongs to Texas Commerce Bank? Answer "we do" or "we do not."

Answer:

a. L. G. McCormick	we do
b. Beacon Hill Farms	we do

SPECIAL ISSUE NO. 8

What sum of money, if any, do you find from a preponderance of the evidence that L. G. McCormick and/or Beacon Hill Farms received which belongs to Texas Commerce Bank? Answer in dollars and cents.

Answer:

a. L. G. McCormick	$ 0.00
b. Beacon Hill Farms	$714,574.01

SPECIAL ISSUE NO. 9

Do you find from a preponderance of the evidence that L. G. McCormick and/or Beacon Hill Farms converted money belonging to Texas Commerce Bank? Answer: "we do" or "we do not."

Answer:

a. L. G. McCormick	we do
b. Beacon Hill Farms	we do

Instruction: You are instructed that "conversion" is the unlawful and wrongful exercise of dominion, ownership and control by a person over property of another to the exclusion of such rights by the owner.

SPECIAL ISSUE NO. 10

What sum of money, if any, do you find from a preponderance of the evidence that L. G. McCormick and/or Beacon Hill Farms converted from Texas Commerce Bank? Answer in dollars and cents.

Answer:

a. L. G. McCormick	$147,281.57
b. Beacon Hill Farms	$147,281.57

SPECIAL ISSUE NO. 11

Do you find from a preponderance of the evidence that Beacon Hill Farms, Inc. was the alter ego of L. G. McCormick? Answer "we do" or "we do not."

Answer: we do

Instruction: You are instructed that a corporation is the alter ego of an individual where it appears that the individual is using the corporation to avoid personal liability or in other situations, such as where:

1. The corporate entity promotes injustice or is relied upon to justify a wrong;

2. The corporation is inadequately capitalized;

3. An individual controls and manages the corporate entity in such a manner that the separateness of the corporation and the individual ceases to exist;

4. The corporate formalities are not adhered to by the corporation.

SPECIAL ISSUE NO. 12

Do you find from a preponderance of the evidence that Ann Marie Smith was acting as agent for, an officer of,

or an employee of, any or all of the following entities or individuals when she endorsed the "Santana" checks and delivered them to Texas Commerce Bank for deposit: Answer "we do" or "we do not."

Answer:

a) Santana Petroleum Corporation, d/b/a Santana Grain & Fertilizer?	we do
b) Beacon Hill Farms?	we do
c) L. G. McCormick?	we do not

Instruction: You are instructed that an "agent" is a person authorized by another to act for him.

SPECIAL ISSUE NO. 13

Do you find from a preponderance of the evidence that Texas Commerce Bank gave notice in a timely manner to L. G. McCormick (individually and as an officer of Beacon Hill Farms, Inc., and Santana Petroleum Corporation, d/b/a Santana Grain & Fertilizer) that the "Santana" checks had been dishonored? Answer "we do" or "we do not."

Answer: we do

Instruction: You are instructed that notice may be given in any reasonable manner and may be written or oral. Written notice is deemed to have been given when sent although it may not have actually been received. As between a bank and its customer, notice should be given either by midnight of the next day following the banking day or within a longer reasonable time after it learns the facts. Delay in giving notice of dishonor is excused

when the delay is caused by circumstances beyond a party's control and he exercises reasonable diligence after the cause of the delay ceases to exist.

SPECIAL ISSUE NO. 14

Do you find from a preponderance of the evidence that, under the circumstances, Texas Commerce Bank was required to give notice of dishonor of the "Santana" checks to L. G. McCormick (individually and as an officer of Beacon Hill Farms, Inc. and Santana Petroleum Corporation, d/b/a Santana Grain & Fertilizer)? Answer "we do" or "we do not."

Answer: we do

Instruction: You are instructed that notice of dishonor may be entirely excused and not required when the party to receive the notice has no reason to expect or no right to require that the instrument be accepted or paid by the Bank to which it has been presented. Notice of dishonor may also be entirely excused when the party to be charged has waived it expressly or by implication either before or after it was due.

SPECIAL ISSUE NO. 15 -

Do you find from a preponderance of the evidence that Beacon Hill Farms, Inc. is estopped to require Texas Commerce Bank to send notification of the return of the Santana checks? Answer "we do" or "we do not."

Answer: we do not

Instruction: You are instructed that estoppel is a concept where one, who by his speech and conduct, has induced another to act in a particular manner, should not be permitted to adopt an inconsistent attitude, position or

course of conduct and thereby cause loss or injury to another. In other words, he, who by his language or conduct, leads another to do what he otherwise would not have done, must not subject the other to loss or injury by disappointing the expectation on which the other acted.

SPECIAL ISSUE NO. 16

What sum of money, if any, do you find from a preponderance of the evidence would be reasonable attorneys' fees for the services performed by Texas Commerce Bank's attorneys, in relation to the amount of time expended on this case as follows:

a. For the legal services rendered in preparation and trial of this cause in this court?

b. For legal services if this case is appealed to the Court of Appeals?

c. For legal services if this case is appealed to the Supreme Court of Texas?

Answer in dollars and cents.

Answer: a. $158,000.00
b. $ 0.00
c. $ 0.00

SPECIAL ISSUE NO. 17

Do you find from a preponderance of the evidence that TEXAS COMMERCE BANK failed to use ordinary care in serving notification to BEACON HILL FARMS, INC. of the return of the Santana checks?

Answer "Yes" or "No."

Answer: No.

If you have answered Special Issue No. 17 "yes", then answer Special Issue No. 18; otherwise, do not answer Special Issue No. 18.

SPECIAL ISSUE NO. 18

Do you find from a preponderance of the evidence that the failure of TEXAS COMMERCE BANK to use ordinary care in sending notification to BEACON HILL FARMS, INC. was a proximate cause of damages to BEACON HILL FARMS, INC.?

Answer "Yes" or "No".

Answer: _____.

SPECIAL ISSUE NO. 19

What sum of money, if any, do you find from a preponderance of the evidence were the damages to Beacon Hill Farms, Inc. proximately caused by the failure of Texas Commerce Bank to use ordinary care in sending notification of the return of the Santana checks? Answer in dollars and cents, if any.

Answer: $ 0.00

You are instructed that the measure of damages for failure to exercise ordinary care in handling an item is the amount of the item reduced by an amount which could not have been realized by the use of ordinary care.

SPECIAL ISSUE NO. 20

Do you find from a preponderance of the evidence that TEXAS COMMERCE BANK violated the terms of the letter agreement dated January 22, 1975?

Answer "Yes" or "No".

Answer: No

APPENDIX J

NO. 1,060,195

IN THE DISTRICT COURT OF
HARRIS COUNTY, TEXAS
215th JUDICIAL DISTRICT

TEXAS COMMERCE BANK
NATIONAL ASSOCIATION

v.

L. G. McCORMICK, ET AL.

(Filed June 30, 1986)

JUDGMENT

On the 11th day of March, 1986, the above-captioned cause was called for trial. The Plaintiff, and Counter Defendant, Texas Commerce Bank National Association, appeared by its designated representative and by its attorneys of record, and announced ready for trial. The Defendants and Counter Plaintiffs, L. G. McCormick, a/k/a Len Gardner ("Tuffy") McCormick, and Beacon Hill Farms, Inc., appeared in person, by their designated representatives, and by their attorneys' of record and announced ready for trial. A jury having been demanded, a jury of twelve (12) good and lawful jurors was duly impaneled. Thereafter, one of the jury members was excused and the case proceeded to trial with eleven (11) jurors.

At the conclusion of the evidence, the Court submitted the case to the jury on Special Issues. The verdict of the jury is incorporated herein for all purposes by reference.

It appearing to the Court that the verdict of the jury was for the Plaintiff and Counter Defendant, Texas Commerce Bank National Association, and against the Defendants and Counter Plaintiffs, L. G. McCormick and Beacon Hill Farms, Inc., judgment should be rendered upon the verdict, in favor of Plaintiff, and against the Defendants. On May 2, 1985, Defendant Beacon Hill Farms, Inc. filed a Petition in Bankruptcy. On May 9, 1986, Defendant L. G. McCormick filed a Petition in Bankruptcy. Plaintiff filed a Motion for Relief from Stay in each bankruptcy proceeding. On June 10, 1986, Agreed Orders were entered modifying the bankruptcy stay orders, to allow this cause of action to be concluded. It is therefore,

ORDERED, ADJUDGED and DECREED by the Court that Plaintiff, Texas Commerce Bank National Association, have and recover of and from Defendant, L. G. McCormick, a/k/a Len Gardner ("Tuffy") McCormick, and Beacon Hill Farms, Inc., jointly and severally, the sum of $1,958,424.57, together with interest thereon at the maximum legal rate from date of judgment until paid; and it is further

ORDERED, ADJUDGED and DECREED that Plaintiff, Texas Commerce Bank National Association, have and recover of and from Defendants, W. L. Marshall and Jim Ned Valley Supply, Inc., jointly and severally, the sum of $2,122,216.00, based on the interlocutory agreed judgment on file herein, together with post-judgment interest on such amount at the maximum legal rate, until paid; and it is further

ORDERED, ADJUDGED and DECREED that Defendants, L. G. McCormick and Beacon Hill Farms, Inc., take nothing on their Counterclaim against Plaintiff, Texas Commerce Bank National Association.

All costs of court expended or incurred in this cause are hereby adjudged against Defendants, L. G. McCormick, Beacon Hill Farms, Inc., W. L. Marshall and Jim Ned Valley Supply, Inc. All writs and process for the enforcement and collection of this judgment or the costs of court may issue as necessary and allowed by law. All other relief not expressly granted herein is denied.

SIGNED this 30 day of June, 1986.

/s/ EUGENE CHAMBERS
Judge Presiding

APPROVED AS TO FORM:

LIDDELL, SAPP & ZIVLEY

By: /s/ D. MITCHELL McFARLAND
D. Mitchell McFarland
Texas Bar No. 13597700

LAURA GIBSON
Texas Bar No. 07869350
3300 Texas Commerce Tower
Houston, Texas 77002
(713) 226-1200

ATTORNEYS FOR PLAINTIFF
TEXAS COMMERCE BANK
NATIONAL ASSOCIATION

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Judgment was served on all counsel of record, by mailing same certified mail, return receipt requested, on this the 24th day of June, 1986.

/s/ D. MITCHELL McFARLAND
D. Mitchell McFarland

APPENDIX K

* * *

By Mr. Gilpin:

Q. And you had appeared first before that Grand Jury when?

A. In June of '75.

Q. Was there ultimately a trial?

A. Yes, sir. We went to trial on about the 6th or 7th of October of that year. May I look again?

Q. Yes.

A. 1976, yes, sir, ten long years ago, October 4.

Q. Were you tried with Mr. Marshall?

A. We filed a motion for separate trial. And they wouldn't let us have it. And we were tried in a joint trial, yes sir.

Q. Who were you represented by in that trial?

A. By Frank Briscoe.

Q. Did Mr. Williams, who had testified here, testify in that trial?

A. Yes, sir. He testified in that trial that he had worked about five or six months with the district attorney in preparing this case.

Q. All right. Did you take the stand in that case?

A. No, sir, I did not.

Q. Why not?

A. My attorney advised me not to.

MR. McFARLAND: Objection, You Honor.

THE COURT: Sustain the objection.

MR. GILPIN: May we approach the bench?

(The following conference was before the bench and out of the hearing of the jury.)

(MR. GILPIN: It is vital that if a man has been convicted they be able to explain the circumstances of that conviction. I think that's Horn Book law.

(THE COURT: If it's Horn Book law, I have never been introduced to it.

(MR. McFARLAND: The Horn Book law says you are not allowed a collateral attack of a judgment in another case.

(MR. GILPIN: We're not trying to set up a collateral attack. We are trying to show something that the man has a right to explain.

(MR. McFARLAND: He had a right of appeal. He didn't. He dismissed the appeal. That was his right to explain. This is a collateral attack.

(MR. GILPIN: A collateral attack would be trying to set it aside.

(THE COURT: You are trying to do the same thing. You are trying to kill the effect.

(MR. GILPIN: I am trying to explain the conviction. I think I am entitled to.

(THE COURT: The objection will be sustained.

(MR. GILPIN: Note our exception, Your Honor.)

* * *

By Mr. McFarland:

Q. . . . Mr. McCormick, the jury found you guilty in the criminal case, right?

A. Yes, sir. That's what the jury did.

Q. And the Judge sentenced you, and said that: "It is therefore considered, ordered, and judicated by the Court that the defendant is guilty of the offense of conspiracy to

commit theft and felony [sic] as found by the jury, and that the said defendant committed said offense on the 27th day of November, 1974, that he be punished as found by the jury, by confinement in the Texas Department of Corrections for ten years and a fine of $5,000?"

A. That's right. That's what it says to that point.

Q. Did you pay the $5,000 fine?

A. No, sir, suspended.

Q. The imposition of the sentence was suspended, and the defendant placed on adult probation for ten years?

A. Right.

Q. When did the probation run out?

MR. GILPIN: Judge, he is going into the details of the judgment. It is already in evidence. I think he has opened up the entire matter of the conviction.

MR. McFARLAND: Can we approach the bench?

THE COURT: Overrule the objection. He hasn't gone into anything except what is on the exhibit in evidence.

Q. (By Mr. McFarland) Mr. McCormick, Paragraph I, which you read on your direct testimony says that, "Pay $367,000 restitution." Is that correct?

A. Correct, sir. I paid all I have been ordered to pay. You didn't read the full sentence, sir.

Q. Do you understand the English language?

A. That's only part of the sentence, to give the instructions.

Q. Eleven sixteen sixty-six seventy-seven.

A. I didn't have it, because the Court precisely ordered me not to borrow from my family, friends or anybody else.

Q. You never paid anything since then?

A. No, sir.

Q. Didn't pay the three sixty-seven?

A. No, sir. There would be another hearing as to how much to pay, if any. He ordered us not to borrow any money, if we didn't make it, to not pay it. Has Mr. Marshall paid it?

A. No, sir. I haven't sued them yet.

Q. Not at all?

A. Not yet.

Q. Did you see Ann Marie Smith?

A. I can't find Ann Marie. That was ten years ago. The last reported address is Grand Cayman Islands. I have no way to serve a process on her. I would be very pleased if I could serve process on her.

MR. McFARLAND: Pass the witness, Your Honor.

* * *

By Mr. Gilpin:

Q. . . . Have you lost business deals because of the conviction and problem with the criminal courts?

THE COURT: Sustain the objection.

MR. McFARLAND: Objection to the relevance.

MR. GILPIN: Counsel didn't state an objection, Your Honor.

THE COURT: State you objection.

MR. McFARLAND: Object to the relevance, Your Honor.

THE COURT: Sustain the objection.

* * *

APPENDIX L

PETITIONERS' APPLICATION FOR
WRIT OF ERROR
SUPREME COURT OF TEXAS

* * *

The Texas Constitutional right of due course of law includes the right to introduce evidence at a meaningful time during trial, to cross examine and produce witnesses, and to be heard fully. *Jordan v. Jordan*, 653 S.W.2d 356, 358 (Tex. App.—San Antonio 1983, no writ); Tex. Const. art. I, § 19. McCormick was not given these opportunities, and the outcome of the trial below unquestionably was prejudiced by his involuntary silence.

* * *

From a review of this record, the conclusion is palpable and inescapable that the Petitioners did not receive a fair trial within the meaning of Tex. Const. art. I, § 19 and Tex. R. Civ. P. 1. This Court should require that they be given one.

PETITIONERS' MOTION FOR REHEARING SUPREME COURT OF TEXAS

* * *

Contrary to the holding of the Court of Appeals, Texas Rule of Evidence 803(22) does not change or even affect the substantive law of collateral estoppel as stated above. Rule 803(22) merely avoids the hearsay rule by permitting the admission of previous criminal judgments for the limited purpose of proving facts essential to the prior conviction. Period. That is a far cry from saying, as the Court of Appeals did, that evidence of any prior judgment of conviction is conclusive as a matter of law and therefore is outside the province of the jury in a subsequent civil case. The Rule does not state, or even suggest, that proof of those facts shall be conclusive in the second proceeding. The Court of Appeals has gone too far. In effect, the Court of Appeals has taken a rule of evidence and converted it into a basis for summary judgment. In so doing, the Court of Appeals' decision also violates the right to due process guaranteed by the U.S. Constitution, for the Petitioners were denied a fair trial. The ability of our citizens to answer and defend allegations and charges against them before they are deprived of life, liberty or property is fundamental to our system of justice. Such a result cannot be allowed to stand.

25

Supreme Court, U.S.
FILED
MAY 25 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1721

In The

Supreme Court of the United States

October Term, 1988

L. G. McCormick and Beacon Hill Farms, Inc.,
Petitioners,

v.

Texas Commerce Bank National Association,
Respondent.

On Petition for Writ of Certiorari
to the Fourteenth District Court of Appeals
in Houston, Texas

RESPONDENT'S BRIEF IN OPPOSITION

D. Mitchell McFarland
Attorney of Record

Jill A. Schaar
Karen L. Fannin
Liddell, Sapp, Zivley,
Hill & LaBoon
3300 Texas Commerce Tower
Houston, Texas 77002
(713) 226-1200

Attorneys for Respondent

RULE 28.1 LISTING

The parties to the proceedings below were Petitioners L. G. McCormick and Beacon Hill Farms, Inc., and Respondent Texas Commerce Bank National Association. In accordance with SUP. CT. R. 28.1, Respondent lists the following parent companies:

1. Texas Commerce Bancshares, Inc. (Respondent's direct parent); and
2. Chemical Banking Corporation (parent of Texas Commerce Bancshares, Inc.).

Respondent has no subsidiaries, other than wholly-owned subsidiaries.

Respondent lists the following affiliates:

1. Gulf Stream Aerospace Corporation;
2. New York Switch Corporation;
3. S.W.I.F.T.;
4. APEX, Inc.;
5. Liberty Brokerage, Inc.;
6. New York Equity Fund 1988 Limited Partnership; and,
7. Lockwood National Bank of Houston.

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No. 88-1721

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Texas Commerce Bank National Association,
Respondent.

On Petition for Writ of Certiorari
to the Fourteenth District Court of Appeals
in Houston, Texas

RESPONDENT'S BRIEF IN OPPOSITION

Respondent Texas Commerce Bank National Association respectfully prays that Petitioners' request for review by certiorari be denied. This Court has no jurisdiction to review the question presented since that question has never been raised, in any form, in any of the proceedings below. Further, Petitioners were not denied the opportunity to present evidence in their own defense.

REPLY TO JURISDICTION

Respondent contends that this Court is without jurisdiction to grant certiorari under 28 U.S.C.A. § 1257 (West Supp. 1989) because the question presented is not one where (1) the validity of a treaty or statute of the United States is drawn into question, or (2) the validity of a state statute is

drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or (3) any title, right, privilege, or immunity is specially set up or claimed under the Constitution, treaties, or statutes of the United States. 28 U.S.C.A. § 1257 (West Supp. 1989).

STATEMENT OF THE CASE

Respondent Texas Commerce Bank National Association ("Texas Commerce") instituted this suit in 1976 against Petitioners L. G. "Tuffy" McCormick ("McCormick") and his corporation, Beacon Hill Farms, Inc. ("Beacon Hill"), and two other Defendants, W. L. "Mann" Marshall, Jr. and Jim Ned Valley Supply, Inc., doing business as and having a division known as Jim Ned Valley Grain (collectively, "Marshall"), for a debt obligation arising from a sizeable overdraft in the corporate checking account which McCormick maintained with Texas Commerce in Beacon Hill's name. The suit charged Petitioners and Marshall with fraud for engaging in a "check kiting" scheme that created an overdraft in the amount of $735,574.01 in Beacon Hill's account with Texas Commerce. Texas Commerce sought to hold McCormick individually liable for the overdraft since he had personally guaranteed payment of the overdraft and any other indebtedness of Beacon Hill. Texas Commerce also sought judgment on a promissory note of Beacon Hill guaranteed by McCormick. Before trial, Marshall agreed to a judgment favoring Texas Commerce in the principal amount of $714,787.00, together with prejudgment interest in the amount of $407,429.00, plus exemplary damages of $1,000,000.00, for a total judgment of $2,122,216.00. The case proceeded to trial against the remaining Defendants, McCormick and Beacon Hill, Petitioners herein.

By passing worthless checks and drafts among three banks located in three different cities, Petitioners took advantage

of the time lapse in the check collection process and thereby obtained false credit. These paper transfers, totalling several million dollars, created the overdraft which formed the basis of the civil suit. When the overdraft was discovered in December 1974, McCormick, as the sole owner of the corporation, personally guaranteed payment of the overdraft and any other indebtedness of Beacon Hill, but he ultimately failed to make such payment. McCormick and Marshall were indicted by a grand jury for conspiracy to commit theft. A jury trial in 1976 resulted in conviction; McCormick was sentenced to ten years in prison and ordered to pay a fine of $5,000.00. Petitioners' Appendix E, pp. 15a-18a. His sentence was subsequently suspended. He was placed on probation for ten years and ordered to make restitution of $367,000.00 to Texas Commerce. The restitution remains unpaid.

Respondent sued Petitioners and Marshall on theories of breach of contract, civil conspiracy, fraud for engaging in a "check kiting" scheme, conversion, money had and received, and alter ego. Petitioners' Appendix G, pp. 21a-56a. During the trial against Petitioners, the presiding Judge of the 215th Judicial District Court of Harris County, Texas admitted McCormick's 1976 criminal conviction as substantive evidence. The 1976 conviction was not offered or admitted for the purpose of impeaching McCormick's credibility as a witness. At the time the conviction was offered by Respondent's counsel, the only objections to the offer raised by McCormick's counsel were: (1) that the conviction was not relevant, (2) that the conviction was remote in time, (3) that the conviction was "not germane" to the civil case, and (4) that the probated sentence received by McCormick was equivalent to deferred

adjudication and therefore not a "final" conviction. Appendix A, pp. 1a-2a. All of these objections were overruled by the trial court. *Id.*

After two weeks of testimony, the jury answered special issues favorable to Respondent and a judgment was entered against Petitioners in the amount of $1,958,424.57, inclusive of prejudgment interest. Petitioners' Appendix J, pp. 76a-78a. The jury denied Petitioners all relief on their counterclaim. *Id.* Petitioners appealed the judgment to the Fourteenth District Court of Appeals at Houston, Texas. Petitioners raised seven points of error to the Court of Appeals in their appellate brief. Appendix B, pp. 3a-4a. None of the points of error presented to the Court of Appeals raised a federal due process challenge. *Id.*

After Petitioners' appeal to the Fourteenth Court of Appeals was submitted, Petitioners filed a supplemental brief that essentially changed the entire basis of their appeal. Appendix C, pp. 5a-6a. Petitioners did not obtain leave from the Court of Appeals to amend their appellate brief to add new points of error, as required by the Texas Rules of Appellate Procedure. *See* TEX. R. APP. P. 74(o). Accordingly, the Fourteenth Court of Appeals only addressed the initial seven points of error actually raised and briefed by Petitioners in their original appellate brief. *See* Opinion of the Fourteenth Court of Appeals, Petitioners' Appendix D, pp. 4a-14a.

After considering every issue properly before it, the Fourteenth Court of Appeals affirmed the judgment in Respondent's favor. Petitioners' Appendix C, p. 3a. Thereafter, Petitioners filed a motion for rehearing in the Fourteenth Court of Appeals. Appendix D, pp. 7a-9a. Significantly, none of these additional points in the motion for rehearing remotely resembles the due process question presented before this Court. On June 23, 1988, the Court of Appeals

denied the motion for rehearing. Petitioners' Appendix D, pp. 4a-14a.

Petitioners next sought review in the Supreme Court of Texas by applying for writ of error. At that stage, Petitioners raised nine points of error. Notably absent was any mention of the Fourteenth Amendment due process challenge now urged by Petitioners. Appendix E, pp. 10a-12a. The Texas Supreme Court denied Petitioners' application for writ of error. Petitioners' Appendix B, p. 2a. Petitioners requested rehearing from the Texas Supreme Court, which motion was overruled. Petitioners' Appendix A, p. 1a.

Petitioners now complain that their federal due process rights have been violated because of the trial court's admission of McCormick's 1976 criminal conviction for conspiracy as substantive evidence. This complaint has never been presented to or decided by any of the Texas courts below.

REASONS FOR DENYING THE WRIT

1. Petitioners never raised the purported federal due process violation in any of the Texas courts below.

This Court has no jurisdiction to review a state court's decision where the federal question was not properly raised in the state proceedings. *Heath* v. *Alabama,* 474 U.S. 82 (1985); *Webb* v. *Webb,* 451 U.S. 493 (1981); 28 U.S.C.A. § 1257 (West Supp. 1989). *See also* SUP. CT. R. 21.1(h). Similarly, it is abundantly clear under Texas law that constitutional challenges must be expressly presented to the trial court in order to be the basis for any subsequent appeal. *Mynhier* v. *State,* 762 S.W.2d 662, 665 (Tex. App. — Houston [14th Dist.] 1988, pet. ref'd). Petitioners never, in any form or fashion, raised the federal due process claim they now assert in any proceeding before the trial court, the

Fourteenth Court of Appeals, or the Supreme Court of Texas. *See* Appendices A-E, pp. 1a-12a.

Petitioners did not present their claim in the courts below in the form of the question presented to this Court because it would have been ludicrous. Petitioners were not denied the right to present a defense at the civil trial. The civil trial lasted more than two weeks. Petitioners cross-examined each of Respondent's witnesses and offered witnesses of their own. Both sides offered numerous exhibits. Respondent did not win the case below on summary judgment based solely on McCormick's prior criminal conviction. *Compare United States* v. *Thomas,* 709 F.2d 968, 972 (5th Cir. 1983). To the contrary, the overwhelming evidence presented to the jury proved that Petitioners and others had defrauded Respondent through a check kiting scheme which, when it fell apart, resulted in an overdraft in the Beacon Hill account at Texas Commerce of more than $735,000.00, an overdraft for which payment was guaranteed by Petitioner McCormick. The overdraft was not paid, and a judgment was entered against Petitioners.

Petitioner's sole basis for presenting a claim to this Court is that McCormick was not allowed to explain to the jury that, at the prior criminal trial where a jury found him guilty beyond a reasonable doubt of conspiracy to commit theft *on the same facts,* he disagreed with his attorney on the handling of the case. Notably, Petitioner Beacon Hill has raised nothing for this Court to decide regarding the judgment against it. Neither Petitioner complains that he was precluded from presenting evidence that might have established that (1) there was no overdraft, (2) McCormick did not guarantee the overdraft, or (3) the overdraft was not created by the check kiting scheme.

Petitioners made no due process objection in any court below because they had none to make. There was no federal

question raised at any point in any court below, and there is nothing which this Court has jurisdiction to decide. In its simplest form, Respondent has obtained a judgment for a breach of its checking account contract with Petitioner Beacon Hill which Petitioner McCormick guaranteed. This much is *conceded* in the Petition! Petition at 4.

2. The exceptions noted in *Michigan* v. *Long* do not apply.

Petitioners concede in their petition to this Court that the opinion of the Fourteenth Court of Appeals is silent on the "federal question" now raised. Petition at 11. While this concession should come as no great surprise since the "question" was never raised, Petitioners assert jurisdiction based on this Court's opinion in *Michigan* v. *Long*, 463 U.S. 1032 (1983). Petition at 10-11. These arguments relate solely to the admissibility of McCormick's prior criminal conviction.

First, Petitioners assert that the Fourteenth Court of Appeals "expressly adopted" the standards of the federal judiciary. Petition at 10. This assertion is misleading at best. The Fourteenth Court of Appeals reviewed prior precedent under the identical federal rule of evidence, FED. R. EVID. 803(22), and applied those standards in interpreting the Texas rule. Federal law did not "compel" the result reached. To so hold would transmute any state court holding on procedure or evidence into a federal question if a decision of a federal court is cited. Further, the cited discussion of the Fourteenth Court of Appeals concerned Petitioners' Point of Error Four, which complained that the trial court erred in not allowing an "explanation of the circumstances" of McCormick's conviction. Petitioners' Appendix D, pp.7a-10a. McCormick's offer of proof showed merely that he disagreed with his counsel on strategy at the criminal trial. Petitioners' Appendix H, pp. 57a-61a. The Fourteenth Court of Appeals cited, as an adequate and independent basis for

excluding this testimony, that it was irrelevant under TEX. R. EVID. 403. Petitioners' Appendix D, pp. 9a-10a.

Second, Petitioners assert that the "record as a whole" will demonstrate that the "federal question" was necessary to determine the case below and that "there was no adequate and independent nonfederal ground on which this judgment could be based." Petition at 11. This contention is more than misleading. In addition to the independent ground cited by the Fourteenth Court of Appeals to affirm the trial court's evidentiary ruling, Petitioners *concede* that an overdraft was created in Beacon Hill's account at Texas Commerce and that McCormick guaranteed that overdraft. Petition at 4. Further, the jury found Petitioners liable to Texas Commerce on theories of contract, conversion, fraud, and money had and received. Petitioners' Appendix I, pp. 62a-75a. Additionally, the jury found that Beacon Hill was the alter ego of McCormick, and that McCormick conspired with another to conduct the check kiting scheme.[1] *Id.* Any of these state common law counts are adequate to support the judgment.

Michigan v. *Long* does not apply where, as here, there was not a constitutional issue, either federal or state, for the court of appeals to decide. *See* Appendix B, pp. 3a-4a.

Further, Petitioners would have this Court believe that the Fourteenth Court of Appeals misconstrued and misapplied federal precedent, thereby allegedly creating a federal question. Petition at 10. Petitioners are totally misguided. The Fourteenth Court of Appeals, in fact, discussed prior federal precedent. *United States* v. *Monkey*, 725 F.2d 1007 (5th Cir. 1984); *United States* v. *Thomas*, 709 F.2d 968 (5th Cir. 1983); *Vela* v. *Alvarez*, 507 F. Supp. 887 (S.D. Tex. 1981).

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[1] Petitioners claim that Texas Commerce did not sue for conspiracy. Petition at 5. It plainly did and obtained a jury finding to that effect. *See* Petitioners' Appendix I, pp. 68a-69a.

Petitioners' Appendix D, pp. 8a-9a. Each of these cases is entirely consistent and unequivocally supports the Fourteenth Court of Appeals' statements that fully litigated issues in a previous criminal case cannot be relitigated in a subsequent civil suit. *Monkey*, 725 F.2d at 1010; *Thomas*, 709 F.2d at 972; *Vela*, 507 F. Supp. at 889. However, the discussion on the preclusive effect of McCormick's judgment related to McCormick's offer of proof that McCormick, an attorney, disagreed with his trial counsel on legal strategy at his criminal trial. Petitioner's Appendix D, pp. 7a-10a. This testimony was irrelevant. TEX. R. CIV. EVID. 401. McCormick was *not* precluded from offering evidence at the trial; but, based on the cases cited, the court would have been correct in granting summary judgment on the civil conspiracy claim. Therefore, the Fourteenth Court of Appeals' discussion creates no basis for this Court's jurisdiction because there is no conflict between the decision and federal law. *See* 28 U.S.C.A. § 1257 (West Supp. 1989). For this reason as well, *Michigan* v. *Long* does not advance Petitioners' position.

3. The Texas fundamental error doctrine does not apply.

Petitioners imaginatively assert that the federal due process question was properly presented under Texas appellate procedure because under Texas law, "fundamental error" may be raised for the first time on appeal.[2] Petition at 9. Assuming that a federal due process violation is fundamental error, Petitioners never availed themselves of the fundamental error doctrine in the state court proceedings.

Petitioners correctly state that "fundamental error" in a civil case is "an error which directly or adversely affects the

---

[2] Respondent assumes that Petitioner is not urging the federal concept of fundamental error, since that doctrine only applies to cases arising from the lower federal courts. *Illinois* v. *Gates*, 462 U.S. 213, 218-19 (1983).

interest of the public generally, as that interest is declared in the statutes or constitution of [Texas]." *Ramsey* v. *Dunlop*, 146 Tex. 196, 205 S.W.2d 979, 983 (1957). By definition, fundamental error is only assigned where the interests of the public generally are offended. Under Texas law, where the error complained of affects only the particular litigants before the court, and not the public in general, the fundamental error doctrine does not apply. *Newman* v. *King*, 433 S.W.2d 420, 422 (Tex. 1968). In this case, the only harm asserted by Petitioners is the admission of McCormick's previous criminal conviction as substantive evidence. As such, the "fundamental error," is unique to Petitioners and thus does not fall within the Texas fundamental error doctrine.

Petitioners complain that the "transgression of the due process clause" was accomplished by the Fourteenth Court of Appeals' misconstruction of the federal constitution as shown on the face of its opinion. Petition at 10. Presumably, then, the due process "error" arose, according to Petitioners, when the Fourteenth Court of Appeals issued its opinion. Even accepting this liberal premise, Petitioners had three subsequent opportunities to raise this so-called "fundamental error": (1) when they submitted their motion for rehearing to the Fourteenth Court of Appeals; (2) when they applied for writ of error to the Texas Supreme Court; and (3) when they requested rehearing of the Texas Supreme Court's denial of the writ of error. Petitioners never raised their federal due process claims at any of these three opportunities. See Appendices D and E, pp. 7a-12a. There is no "fundamental error" for this Court to review.

4. Reply to Petitioners' reasons for granting the writ.

Petitioner's "ingenuity" at creating jurisdiction is exceeded only by the boldness in their reasons for granting the writ. Petition at 12-20. As discussed above, Petitioners'

basis for jurisdiction is that the Fourteenth Court of Appeals "expressly adopted" the standards of the federal judiciary, misconstrued the federal constitution, and misconstrued "otherwise valid rules of evidence and the law of judgments." Petition at 10. Petitioners' complaint is that after McCormick's conviction for conspiracy to commit theft was admitted, McCormick was not allowed to inform the jury that his personal trial strategy differed from his counsel at the criminal trial.

The Petition states:

> If a criminal judgment meets other tests of admissibility and the criteria of FED. R. EVID. 803(22) or TEX. R. EVID. 803(22), it may be admitted 'for what it is worth,' and the findings inherent in it may be rebutted by the opponent, who should have the opportunity to offer an explanation about the conviction.
>
> . . .
>
> At most, the 1976 judgment should have been admitted as nonpreclusive evidence under TEX. R. EVID. 803(22), and at least McCormick should have been permitted to explain it.

Petition at 14, 19.

This is exactly what happened. The conviction was offered as evidence of McCormick's liability for civil conspiracy, and he was allowed an opportunity to submit relevant evidence that the conspiracy did not take place. Thus, Petitioners *concede* the very basis for their petition.

Further, Petitioners state that they were not sued for civil conspiracy (Petition at 5) and that the jury did not find a conspiracy (Petition at 17). These claims are blatantly false. Respondent's trial court petition stated a claim for civil conspiracy, and Special Issue No. 3 to the jury specifically found a conspiracy to exist. Petitioners' Appendix G,

pp. 22a-28a, 68a. *See Massey* v. *Armco Steel Co.*, 652 S.W.2d 932, 934 (Tex. 1983).

Petitioner Beacon Hill states no reason for granting the writ; it is only McCormick who complains. Petitioners do not and cannot cite one instance where relevant evidence was excluded which would indicate (1) that McCormick did not conspire to conduct a check kiting scheme, (2) that such scheme did not occur, (3) that no overdraft was created, or (4) that McCormick did not guarantee payment of the overdraft.

A granting of the writ would accomplish nothing. Petitioners are liable on the judgment for breach of the account agreement on the overdraft, for breach of the guaranty of that overdraft, and for the finding of alter ego, in any event. The amount of the judgment will remain the same.

CONCLUSION

Conspicuous by its absence in their petition to this Court is Petitioners' compliance with this Court's Rule 21.1(h). In fact, Petitioners' brash statement that they have previously raised this novel due process claim "by clear implication" during the trial (Petition at 10) mocks this Court's Rule. Petitioners cannot show this Court, by citing to the statement of facts or the transcript on appeal, the following matters: (1) the stage of proceedings in the court of first instance where the precise federal question sought to be reviewed was raised; (2) the method or manner of raising the precise federal question; (3) the manner in which the precise federal question sought to be reviewed was passed upon by the court; and (4) any specific citations to the statement of facts or transcript showing that the federal question was timely and properly raised so as to give this Court jurisdiction to review the judgment on writ of certiorari. *See* SUP. CT. R. 21.1(h). Petitioners' lack of specificity is quite telling.

Petitioners are continuing here what they began in 1974: circulating a lot of paper that has no substantive basis. Respondent therefore prays that this Court deny the Petition for Certiorari, order all costs to be taxed against Petitioners, and affirm the judgment of the Fourteenth Court of Appeals.

Respectfully submitted,

D. MITCHELL MCFARLAND
Attorney of Record

JILL A. SCHAAR
KAREN L. FANNIN
LIDDELL, SAPP, ZIVLEY,
HILL & LABOON
3300 Texas Commerce Tower
Houston, Texas 77002
(713) 226-1200

Attorneys for Respondent
Texas Commerce Bank
National Association

CERTIFICATE OF SERVICE

I, D. Mitchell McFarland, a member of the Bar of this Court, hereby certify that on this . . . . . day of May, 1989, three copies of Respondent's Brief in Opposition in this case were mailed, first class postage prepaid, to the persons listed below. I further certify that all parties required to be served, have been served.

Linda Lelia Susan Moroney
2606 First City Tower
Houston, Texas 77002

John D. Gilpin
Gilpin, Paxson & Bersch
1300 Post Oak Blvd., Suite 2300
Houston, Texas 77056

Daniel L. Rotenberg
Professor of Law
University of Houston Law Center
Houston, Texas 77204-6371

D. MITCHELL MCFARLAND
Attorney of Record for Respondent

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APPENDIX A

NO. 1,060,195

TEXAS COMMERCE BANK NATIONAL ASSOCIATION
VS.
L. G. MCCORMICK, ET AL.

IN THE 215TH JUDICIAL DISTRICT
COURT OF HARRIS COUNTY, TEXAS

STATEMENT OF FACTS
VOLUME II

* * *

Q: (By Mr. McFarland) Mr. Bemrose, let me hand you what have been marked as Plaintiff's Exhibits 35, 36, 37, and 38. And Your Honor, these are certified copies of court records from the Harris County Criminal Courts.

Mr. Gilpin: Your Honor, again I'm going to object to this entire matter as being not relevant, remote in time, and not germane to this case. Following through on the objections that I have brought before the Court, before the case began, and restated in voir dire, and opening statement, and we believe it is improper to be shown at this time in the evidence stage.

Mr. McFarland: In order to make the record clear, we would offer the copies of the court records shown as 35, 36, 37 and 38. And in response to Mr. Gilpin's objection, as we pointed out to the Court in pretrial, the conviction in this case is admissible under Rule 803(22). It is a conviction regarding the same facts. And the necessary facts to the conviction are the same facts that we have on

trial in this case. It is not remote as to the time. And Mr. Gilpin is wrong with regard to the interpretation of Rule 609. Under that rule, it is less than 10 years old, and not remote. And the Court may admit convictions that are less than 10 years old.

The Court: Come up. (Whereupon there was a conference at the bench out of the hearing of the jury and the reporter.)

Mr. Gilpin: Your Honor, I object to the offer of these exhibits, since it goes into the criminal court matter, and it's remote in time.

Further, we object because Mr. McCormick received probation, which is as I have indicated under the state of the law as it then existed has been translated at this point in time to deferred adjudication, which would not be admissible, is not a final conviction. Therefore, I object to it.

The Court: The objection is overruled. It will be admitted.

Mr. Gilpin: Perhaps I had better state for the record further that in particular I object to the admission of the exhibits that are complaints by the State, as opposed to the judgment by the State. I think those are separate items, cumulative and prejudicial and couched in terms of what the State hopes to prove. And the judgment shows what the State, what counsel is concerning, the State did prove.

The Court: Overrule the objection. It will be admitted.

APPENDIX B

NO. B14-86-743-CV

IN THE COURT OF APPEALS
FOR THE FOURTEENTH
SUPREME JUDICIAL DISTRICT
OF TEXAS AT HOUSTON

L. G. MCCORMICK, ET AL.,

Appellants,

VS.

TEXAS COMMERCE BANK NATIONAL ASSOCIATION,

Appellee.

BRIEF FOR APPELLANTS

---

* * *

POINT OF ERROR ONE:

The Court Below Erred by Admitting into Evidence Prejudicial References to McCormick's Appearance as a Witness Before a Grand Jury in 1960 When He was Merely Summoned to Testify and was Not Convicted of a Crime.

POINT OF ERROR TWO:

The Court Below Erred in Admitting Evidence of McCormick's 1976 Conviction of a Crime Arising From the Same Acts Forming the Basis of This Lawsuit, Because He Pled Not Guilty.

POINT OF ERROR THREE:

Even if McCormick's 1976 Conviction were Admissible for Impeachment Purposes, the Court Below Abused its Discretion in Failing to Determine that the Prejudicial Effect of the Conviction Far Outweighed its Probative Value.

POINT OF ERROR FOUR:

Even if McCormick's 1976 Conviction were Admissible as Substantive Proof or for Impeachment, the Court Below Erred by Denying McCormick the Right to Explain the Circumstances of his Criminal Conviction.

POINT OF ERROR FIVE:

The Court Below Erred in Impaneling a Jury Because the Bank Failed to Make a Timely Jury Demand Under Tex. R. Civ. P. 216.

POINT OF ERROR SIX:

The Court Below Erred in Failing to Excuse Juror Emma North When She Withheld Her Bias During Voir Dire But Revealed it During Trial and by Failing to Grant the Appellants' Ensuing Motion for a Mistrial.

POINT OF ERROR SEVEN:

The Court Below Erred in Entering Judgment in Favor of the Bank When the Rights of the Appellants were Denied in Such a Way as was Reasonably Calculated to Cause and Probably Did Cause Rendition of an Improper Judgment.

APPENDIX C

NO. B14-86-743-CV

IN THE COURT OF APPEALS
FOR THE FOURTEENTH
SUPREME JUDICIAL DISTRICT
OF TEXAS AT HOUSTON

L. G. MCCORMICK, ET AL.,
Appellants,

VS.

TEXAS COMMERCE BANK NATIONAL ASSOCIATION,
Appellee.

APPELLANTS' SUPPLEMENTAL BRIEF

* * *

SUPPLEMENTAL ARGUMENT:

I. When Juror McCormack was Excused During Trial and Fewer Than Twelve People Remained on the Jury, the Trial Court Committed Reversible Error by Failing to Grant the Appellants' Motion for a Mistrial. (Germane to Points of Error 5, 6 and 7).

A. *The right to trial by twelve jurors is different from the power of fewer than twelve to render a valid verdict.*

B. *The right to a trial before a full jury of twelve may be waived.*

C. *The Appellants did not waive their right to a full jury because they did not agree to a trial before eleven jurors. By forcing the Appellants to proceed with trial before an incomplete jury, the trial court violated Tex. Gov't. Code § 62.201.*

D. *The Appellants were harmed by being forced to proceed with eleven jurors.*

II. McCormick's 1976 Criminal Prosecution was Inadmissible as Substantive Proof Under Tex. R. Evid. 803(22). (Germane to Points of Error 2, 3, and 7 and to Appellee's Reply Points 2, 3 and 6).

A. *The scope of Rule 803(22) is limited.*

B. *The 1976 criminal proceedings did not result in a "judgment of conviction."*

C. *The facts essential to sustain a conviction for conspiracy to commit theft are different from those essential to the civil cause of action for "check kiting."*

III. The Prejudicial References to McCormick as an "Unindicted Co-Conspirator" When He Merely Appeared as a Witness Before a Federal Grand Jury in 1960 Were Irrelevant and Thus Inadmissible. (Germane to Points of Error 1 and 7).

IV. The 1976 Judgment of Conviction Does Not Collaterally Estop the Appellants From Explaining it. The Appellants Have Referred This Court to Ample Law in Support of Their Position, But the Appellee Has Cited None. (Germane to Points of Error 2, 3, 4 and 7 and to Appellee's Reply Point 3).

V. A Jury Should Never Have Been Summoned Because the Bank Never Made Proper Demand for One. (Germane to Points of Errors 5, 6 and 7).

A. *Under Tex. R. Civ. P. 248, a demand must first be made before a jury is summoned.*

B. *The record demonstrates that the Bank did not demand a jury.*

C. *That this particular case was tried to a jury resulted in an improper verdict and harmed the Appellants.*

APPENDIX D

NO. B14-86-743-CV

IN THE COURT OF APPEALS
FOR THE FOURTEENTH
SUPREME JUDICIAL DISTRICT
OF TEXAS AT HOUSTON

L. G. MCCORMICK, ET AL.,

Appellants,

VS.

TEXAS COMMERCE BANK NATIONAL ASSOCIATION,

Appellee.

MOTION FOR REHEARING EN BANC

* * *

POINT OF ERROR ONE:

The Court of Appeals Erred in Overruling Appellants' Points of Error Five, Six and Seven Because the Trial Court Committed Fundamental Error Directly and Adversely Forcing the Appellants to Proceed with Trial When a Juror was Excused and Only Eleven Jurors Remained, in Violation of the Appellants' Statutory Right Under Tex. Gov't. Code §62.201 to a Jury of Twelve Persons Absent Agreement to a Lesser Number.

POINT OF ERROR TWO:

The Court of Appeals Erred in Overruling Appellants' Points of Error Five, Six and Seven Because the Trial Court Committed Reversible Error by Forcing the Appellants to Proceed With Trial When a Juror was Excused and Only Eleven Jurors Remained, in Violation of the Appellants' Statutory Right Under Tex. Gov't. Code §62.201 to a Jury of Twelve Persons Absent Agreement to a Lesser Number.

POINT OF ERROR THREE:

The Court of Appeals Erred in Overruling Points of Error Two, Three, Four and Seven Because the Trial Court Erred in Admitting into Evidence a 1976 Judgment of Conviction as Substantive Proof Under Tex. R. Evid. 803(22) When the Criminal Proceedings Did Not Result in a Final Judgment of Conviction, and the Elements for Conspiracy to Commit Theft are Different From Those for "Check Kiting."

POINT OF ERROR FOUR:

The Court of Appeals Erred in Overruling Points of Error Four and Seven Because the Trial Court Erred in Denying McCormick the Right to Explain the 1976 Criminal Proceedings and Judgment of Conviction When He was not Collaterally Estopped From Doing So.

POINT OF ERROR FIVE:

The Court of Appeals Erred in Overruling Points of Error One, Two, Three, Four and Seven on Grounds of Waiver Because McCormick Preserved the Trial Court's Error in Admitting into Evidence Inflammatory and Irrelevant References to McCormick as an "Unindicted Co-Conspirator" When McCormick was Merely Summoned to Testify Before a Grand Jury in 1960 and Was Not Under Investigation or Indicted.

POINT OF ERROR SIX:

The Court of Appeals Erred in Overruling Points of Error Three and Seven Because the Trial Court Erred in Admitting the 1976 Criminal Proceedings and Judgment of Conviction for Impeachment Purposes and in Failing to Determine That the Prejudicial Effect of the 1976 Judgment of Conviction Used for Impeachment Purposes Far Outweighed its Probative Value.

POINT OF ERROR SEVEN:

The Court of Appeals Erred in Overruling Points of Error Five, Six and Seven Because the Trial Court Violated Tex. R. Civ. P. 248 by Summoning a Jury on the

Day of Trial When the Bank had not Properly Demanded One.

POINT OF ERROR EIGHT:

The Court of Appeals Erred in Overruling Points of Error Five, Six and Seven Because the Trial Court Violated Tex. R. Civ. P. 216 by Impaneling a Jury When the Bank Had Not Properly Demanded a Jury.

POINT OF ERROR NINE:

The Court of Appeals Erred in Overruling Point of Error Seven Because the Trial Court Erred in Entering Judgment in Favor of the Bank When the Rights of the Appellants were Denied in Such a Way as was Reasonably Calculated to Cause and Probably Did Cause Rendition of an Improper Judgment.

APPENDIX E

No. C-7707

IN THE SUPREME COURT OF TEXAS

L. G. MCCORMICK AND BEACON HILL FARMS, INC.,
Petitioners,

VS.

TEXAS COMMERCE BANK NATIONAL ASSOCIATION,
Respondent.

PETITIONERS' APPLICATION FOR WRIT OF ERROR

---

* * *

POINT OF ERROR ONE:

The Court of Appeals Erred in Affirming the Judgment Because the Trial Court Committed Fundamental Error by Forcing the Petitioners to Proceed With Trial When a Juror was Excused and Only Eleven Jurors Remained, in Violation of the Texas Constitution and Petitioners' Statutory Right Under Tex. Gov't Code § 62.201 to a Jury of Twelve Persons Absent Agreement to a Lesser Number. (Germane to Motion for Rehearing En Banc, Point No. 1).

POINT OF ERROR TWO:

The Court of Appeals Erred in Affirming the Judgment Because the Trial Court Committed Reversible Error by Forcing the Petitioners to Proceed With Trial When a Juror was Excused and Only Eleven Jurors Remained, in Violation of the Texas Constitution and Petitioners' Statutory Right Under Tex. Gov't Code § 62.201 to a Jury of Twelve Persons Absent Agreement to a Lesser Number. (Germane to Motion for Rehearing En Banc, Point No. 2).

POINT OF ERROR THREE:

The Court of Appeals Erred in Affirming the Judgment Because the Trial Court Erred in Admitting into Evidence a 1976 Judgment of Conviction as Substantive Proof Under Tex. R. Evid. 803(22) When the Criminal Proceedings Did Not Result in a Final Judgment of Conviction, and the Elements for Conspiracy to Commit Theft are Different From Those For "Check Kiting." (Germane to Motion for Rehearing En Banc, Point No. 3.)

POINT OF ERROR FOUR:

The Court of Appeals Erred in Affirming the Judgment Because the Trial Court Erred in Denying McCormick the Right to Explain the 1976 Criminal Proceedings and Judgment of Conviction When He was not Collaterally Estopped From Doing So. (Germane to Motion for Rehearing En Banc, Point No. 4.)

POINT OF ERROR FIVE:

The Court of Appeals Erred in Holding That McCormick Failed to Preserve the Trial Court's Error in Admitting into Evidence Inflammatory and Irrelevant References to McCormick, Such as an "Unindicted Co-Conspirator," When McCormick was Merely Summoned to Testify Before a Federal Jury in 1960 and was not Under Investigation or Indicted. (Germane to Motion for Rehearing En Banc, Point No. 5.)

POINT OF ERROR SIX:

The Court of Appeals Erred in Affirming the Judgment Because the Trial Court Admitted into Evidence the 1976 Criminal Proceedings and Judgment of Conviction for Impeachment Purposes Without First Determining That the Prejudicial Effect of That Evidence Far Outweighed its Probative Value. (Germane to Motion for Rehearing En Banc, Point No. 6).

POINT OF ERROR SEVEN:

The Court of Appeals Erred in Affirming the Judgment Because the Trial Court Violated Tex. R. Civ. P. 248 By Summoning a Jury on the Day of Trial When the Bank

had not Properly Demanded One. (Germane to Motion for Rehearing En Banc, Point No. 7.)

POINT OF ERROR EIGHT:

The Court of Appeals Erred in Affirming the Judgment Because the Trial Court Violated Tex. R. Civ. P. 216 by Impaneling a Jury When the Bank had not Properly Demanded One. (Germane to Motion for Rehearing En Banc, Point No. 8.)

POINT OF ERROR NINE:

The Court of Appeals Erred in Affirming the Judgment in Favor of the Bank When the Rights of the Petitioners Were Denied in Such a Way as was Reasonably Calculated to Cause and Probably Did Cause Rendition of an Improper Judgment. (Germane to Motion for Rehearing En Banc, Point No. 9.)

Supreme Court, U.S.
FILED
JUN 9 1989
JOSEPH F. SPANIOL, JR.
CLERK

NO. 88-1721

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

L. G. McCORMICK AND
BEACON HILL FARMS, INC.,
Petitioners,

v.

TEXAS COMMERCE BANK,
NATIONAL ASSOCIATION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FOURTEENTH COURT OF APPEALS DISTRICT OF TEXAS

PETITIONERS' REPLY BRIEF

LINDA LELIA SUSAN MORONEY
2606 First City Tower
1001 Fannin Street
Houston, Texas 77002-6760
(713) 654-4588
Counsel of Record for Petitioners

JOHN D. GILPIN
GILPIN, PAXSON & BERSCH
1300 Post Oak Boulevard
Suite 2300
Houston, Texas 77056
(713) 623-8800
Counsel for Petitioners

Of Counsel:

DANIEL L. ROTENBERG
Professor of Law
University of Houston
Law Center
Houston, Texas 77204-6371
(713) 749-7357

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NO. 88-1721

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I. THE PETITIONERS PROPERLY RAISED THE VIOLATION OF THEIR FEDERAL RIGHT OF DUE PROCESS UNDER THE FOURTEENTH AMENDMENT ACCORDING TO TEXAS LAW, SO THAT THE FEDERAL QUESTION IS BEFORE THIS COURT.

In its Brief in Opposition, the Respondent states that the federal due process question was never raised "in

any form or fashion" before any of the Texas trial or appellate courts (Brief in Opposition, pp. 5-6). The Respondent further states to this Court that the Petitioners improperly changed the basis of their appeal (Brief in in Opposition, p. 4). The Petitioners' Supplemental Brief to the Fourteenth Court of Appeals begins as follows:

> "Having requested and obtained leave of Court during oral argument on January 14, 1988, L. G. McCormick and Beacon Hill Farms, Inc., the Appellants, selectively supplement their oral argument and the argument contained in their Brief filed on July 3, 1987, as follows: . . . ."

(Appellants' Supplemental Brief, p. 1). No points of error were added. The Fourteenth Court of Appeals must have considered the Supplemental Brief, which contains much of the argument made to this Court, for if the Court of Appeals had stricken it, the Court was required to allow the Supplemental Brief "to be amended or supplemented." Tex. R. App. P. 74(o). The Supplemental Brief was duly filed.

In their Petition and accompanying Appendix (pp. 8-12), the Petitioners have presented to this Court varying methods by which they raised the federal question in the Texas courts. To clarify the basis for this Court's review jurisdiction, the Petitioners would call the Court's attention to the following:

1. In addition to the decision of the Fourteenth Court of Appeals having been expressly based on its misunderstanding of federal Constitutional law (Petition, p. 10), it is not clear from the face of the opinion that the

Fourteenth Court of Appeals' decision is "alternatively based on bona fide separate, adequate and independent state grounds." *Michigan v. Long*, 463 U.S. 1032, 1040-41 (1981); Appendix D to Petition, pp. 4a-14a. *Compare California v. Krivda*, 409 U.S. 33, 35 (1972) (when alternative state and federal grounds are clearly expressed in the opinion, this Court is unable to say with certainty that the state court judgment was not based on the state ground). The Petitioners believe the opinion of the Fourteenth Court of Appeals unequivocally rests on that court's misunderstanding of federal precedent, but even if the opinion were unclear or ambiguous, in the absence of a clear expression of the state ground on which the decision is based, this Court's jurisdiction to review the state action under the federal Constitution is unimpaired. *Michigan v. Long*, 463 U.S. at 1041. The mere possibility that the Texas Court of Appeals might have reached the same conclusion if it had decided the federal due process question purely as a matter of Texas law does not create an adequate and independent state ground that relieves this Court of the necessity of considering the federal question. *United Air Lines v. Mahin*, 410 U.S. 623, 630-31 (1973).

2. The necessary effect of the Texas judgment is to deny Petitioners' federal claim, and that is sufficient to preserve the federal question for review. *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 61, 63 (1928).

3. From the outset, at trial and on appeal, the Petitioners have asserted the unfairness of the individual and cumulative errors committed by the trial court. (Appellants' Briefs to the Fourteenth Court of Appeals; Application for Writ of Error to the Supreme Court of Texas).

Any attack on the fundamental fairness of the trial due to cumulative error, and based on the cumulative impact of evidentiary rulings which would frustrate a defendant's ability to develop his defense, is an argument which properly preserves the federal question for review. *Chambers v. Mississippi,* 410 U.S. 284, 289-90 (1973).

4. The Respondent is unfamiliar with decisions of this Court which would permit the presentation of the Petitioners' federal claim when that claim has been raised by "clear implication" before the state courts (Respondent's Brief in Opposition, p. 12). *See, e.g., Webb v. Webb,* 451 U.S. 493, 496-97 (1981); *New York ex rel. Bryant v. Zimmerman,* 278 U.S. at 63. In addition, to prevent fundamental unfairness, this Court may apply its "plain error" doctrine to the Texas state courts, as well as to federal courts. *Webb v. Webb,* 451 U.S. at 502 (Powell, J., concurring); *Vachon v. New Hampshire,* 414 U.S. 478, 479 (1974). The record as a whole will confirm that the federal due process claim was clearly implicit in the Petitioners' objections to the trial court's rulings,[1] as well as being subsumed in other arguments on appeal. The express presentation of the federal question has been discussed in the Petition (pp. 10-11).

The authorities relied on by Respondent to contest the proper presentation of the federal claim in the courts below are not applicable. First, Respondent contends that under Texas law, Constitutional challenges must be expressly presented to the trial court in order to be considered on appeal, citing *Mynhier v. State,* 762 S.W.

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1. Statement of Facts, pp. 38-43, 56-58, 132-134, 227-233, 1080-1086, 1098-1138, 1205-1207, 1307-1314, 1382-1414, 1423-1425, 1448-1449, 1510-1512.

2d 662 (Tex. App.—Houston [14th Dist.] 1988, pet. ref'd). This case does not deal with the doctrine of fundamental error, and merely stands for the proposition that a complaint concerning the admission of evidence based on Texas Constitutional grounds must be consistent at trial and on appeal, and the basis urged at trial may not be modified on appeal. 762 S.W.2d at 665. In addition, Respondent contends that the fundamental error doctrine does not apply because any harm suffered by the Petitioners is unique to them and does not affect the public generally, relying on *Newman v. King*, 433 S.W. 2d 420 (Tex. 1968). *Newman* simply holds that the failure to appoint a guardian ad litem in a name change proceeding is not fundamental error when the minor is already represented by a guardian or next friend. 433 S.W.2d at 422. By contrast, in Texas a fourteenth amendment due process violation is of such magnitude that Texas law deems the error "fundamental" to the integrity of the trial, requiring automatic reversal. *Williams v. Capitol County Mutual Fire Ins. Co.*, 594 S.W.2d 558, 560 (Tex. Civ. App.—Fort Worth 1980, no writ).

The Petitioners have discussed the unexpected departure from Texas and federal precedent by the Fourteenth Court of Appeals (Petition, pp. 8-9, 15-16). When it became clear that the Fourteenth Court of Appeals was overruling Texas precedent and that the Texas Supreme Court was allowing that decision to stand, the federal claim was raised at the first opportunity. There is no doubt from the record that a claim under the federal Constitution was presented adequately, properly, and in due time under Texas law. *See Webb v. Webb*, 451 U.S. at 501; *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. at 451, 453 (1930).

II. BY THEIR UNCONSTITUTIONAL CONSTRUCTION OF AN OTHERWISE VALID STATE RULE OF EVIDENCE, THE TEXAS COURTS HAVE DENIED THE PETITIONERS' RIGHT OF FEDERAL DUE PROCESS AND MUST HAVE DONE SO ON FEDERAL CONSTITUTIONAL GROUNDS.

The Respondent has missed the point of the Petitioners' request for certiorari. The merits of Respondent's claim and the Petitioners' counterclaim have not been drawn in issue. Rather, the Petitioners' complaint is that the Texas courts' misconstruction of a state rule of evidence has been used to deny their federal due process rights, and the denial of those rights prevented a valid trial on the merits. To be sure, the Fourteenth Court of Appeals did "discuss prior federal precedent" (Respondent's Brief in Opposition, p. 8), but the Court of Appeals did not understand those cases, or the rudiments of collateral estoppel, or the proof required to sustain McCormick's prior criminal conviction for conspiracy, or the wholly dissimilar elements of proof in the subsequent civil suit for check kiting. If collateral estoppel had been applicable, as the befuddled Texas courts thought, this case never would have been tried before a jury. By injecting the doctrine into the fact finding process, the Texas courts have created a confusing, as well as an incorrect, precedent. This Court can well ascertain that the Respondent's civil suit was, in actuality, not one for civil conspiracy to commit check kiting, but rather check kiting or fraud itself. It is true that the jury found that Petitioner McCormick conspired with another to kite checks (Special Issue No. 3, Petition Appendix, p. 68a), but the proximate cause and damage issues were not

based on the finding of a conspiracy, but rather on the completed act of check kiting. (Special Issues 4 and 5, Petition Appendix, pp. 68a-69a). The Respondent does not dispute this. (Respondent's Brief in Opposition, p. 11). In Texas, the essence of an action for civil conspiracy is damages, and to sustain a verdict for conspiracy, it is not enough that a conspiracy was formed. *Schlumberger Well Surveying Corp. v. Nortex Oil & Gas Corp.*, 435 S.W.2d 854, 856-58 (Tex. 1969); *Starling v. Hill*, 121 S.W.2d 648, 650 (Tex. Civ. App.—Waco 1938, no writ). For the reasons contained in the Petition (pp. 16-19), it is not possible to ascertain which facts actually were litigated in the earlier criminal case, but in any event, that conviction does not prove the receipt of money. No collateral estoppel arises.

The Respondent misunderstands the nature of the Petitioners' complaint in being prohibited from offering rebuttal testimony, stating that McCormick merely would have testified about a difference in "his personal trial strategy." (Respondent's Brief in Opposition, pp. 6, 11). The bill of exceptions (Petition Appendix H, pp. 57a-61a) shows that McCormick would have told the jury, *inter alia*, that the conviction almost ten years earlier was for conspiracy to commit theft and not check kiting, two entirely different causes of action involving different proof; that the sentence was probated; and that his lawyer in the criminal trial had been supported by the Bank and its lawyers in a political race. (Appendix, pp. 58a-60a). Because McCormick was not permitted to explain the circumstances of his conviction when that highly inflammatory fact was systematically hammered before the jury, he was prohibited from presenting an effective defense.

Because the trial court's judgment has been upheld by the Fourteenth Court of Appeals, and because there is no adequate and independent state ground on which the Court of Appeals' decision could rest, the case below must have been decided on federal Constitutional grounds. This case presents an important question touching the accommodation of state and federal interests under the federal Constitution, *Kosydar v. National Cash Register Co.*, 417 U.S. 62, 65 (1974), and the opinion of the Fourteenth Court of Appeals conflicts with those of all the other states, *Fuller v. Oregon,* 417 U.S. 40, 42 (1974). Therefore, Petitioners ask this Court to properly exercise its supervisory role over the courts of the State of Texas to achieve consistency, as well as a Constitutionally correct result.

CONCLUSION

For these reasons, and for those set out in the Petition for a Writ of Certiorari, the Petitioners request that certiorari be granted, that the judgment of the Fourteenth Court of Appeals be reversed, and that this case be re-tried in accordance with federal Constitutional safeguards.

Respectfully submitted,

LINDA LELIA SUSAN MORONEY
2606 First City Tower
1001 Fannin Street
Houston, Texas 77002-6760
(713) 654-4588

JOHN D. GILPIN
GILPIN, PAXSON & BERSCH
1300 Post Oak Boulevard
Suite 2300
Houston, Texas 77056
(713) 623-8800

Of Counsel:

DANIEL L. ROTENBERG
Professor of Law
University of Houston Law Center
Houston, Texas 77204-6371
(713) 749-7357

June 12, 1989

CERTIFICATE OF SERVICE

I, Linda Lelia Susan Moroney, a member of the bar of this Court, certify that on this 12th day of June, 1989, three copies of the Petitioners' Reply Brief were mailed, first class postage prepaid, to the person listed below, and that all parties required to be served have been served.

Mr. D. Mitchell McFarland
Liddell, Sapp, Zivley, Hill & LaBoon
3300 Texas Commerce Tower
Houston, Texas 77002

LINDA LELIA SUSAN MORONEY
Counsel of Record for Petitioners